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No. 85-698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EL CID, LTD.,

Petitioner,

vs.

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS, GRIFFIS & MC OUAT LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND, and DAVID M. KOOGLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Antitrust Questions

1. Under the doctrine of this Court that the Sherman Act protects competition not competitors, do acts that foreclose all competitors injure competition?

2. Does predatory conduct intended to exclude all competitiors from a flow of commerce and to usurp that flow for the benefit of the predators have an effect on competition under the Sherman Act?

3. Does a discrete source of a valuable commodity constitute a geographic "market" within Section 1 of the Sherman Act?

4. When defendants use unfair means to foreclose all competitors, United States and foreign, from access to a very valuable foreign source of gold, does such conduct have the more-than-*de minimis* impact on commerce necessary for application of the Sherman Act?

The published opinion of the District Court answers these four questions in the negative. The unpublished opinion of the Court of Appeals does not address them. Other federal courts have answered them in the affirmative.

5. Mere bigness not being an offense under the Sherman Act, does mere smallness bar one from recovering under that Act?

6. Does the completeness of defendants' predatory success insulate them from liability to a victim of their unlawful acts?

Both courts below answered both these questions in the affirmative. This Court and other federal courts have answered No. 6 in the negative. We do not find that No. 5 has previously been addressed.

Choice of Law Questions

7. Once a federal court recites correctly the applicable principles of state law, is it then free to ignore those principles or stand them on their head in applying them to the facts?

8. When New York chooses the law of the place having the most significant relationship with the subject matter of the alleged torts, and when the federal court sets out a neat little table of facts that show on their face that the most significant relationship is with A not B, is the federal court nevertheless free to hold that the most significant relationship is with B not A?

9. In determining what place has the most significant relationship with a successfully consummated conspiracy, should the court sever and disregard the situs of the "activities that spawned the alleged conspiracy" on the ground that "a plot ... in and of itself is not actionable"?

The District Court effectively answered these three questions in the affirmative. (The words quoted in No. 9 appear in its opinion herein, 575 F.Supp. 1513 at 1517.) The Court of Appeals affirmation was without opinion on these questions. Generally accepted principles require these questions to be answered in the negative; this Court has effectively answered No. 9 in the negative.

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The memoranda and orders of the District Court are reported at 551 F.Supp. 626 (S.D.N.Y. 1982) (being included as Appendix B hereto*); 575 F.Supp. 1513 (S.D.N.Y. 1983); and 588 F.Supp. 125 (S.D.N.Y. 1984). The orders of the Court of Appeals (being included as Appendix A hereto) are unreported.

Jurisdiction

The order of the Court of Appeals for the Second Circuit affirming the judgment of the District Court was entered on June 11, 1985, and the order denying petitioner's petition for rehearing was entered on July 23, 1985. This petition for a writ of certiorari is being filed within 90 days of the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Statutes Involved

Section 1 of the Sherman Act, 15 U.S.C. §1, provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade of commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

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* Appendices A and B hereto are cited, respectively, "A-" and "B-" and page number. The Joint Appendix filed with the appeal to the Court of Appeals is cited "JA-" and page number.

Section 4 of the Clayton Act, 15 U.S.C. §15, provided in 1976, when this action was commenced:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

(Section 4 was amended in 1980 and 1982.)

Statement of the Case

The complaint was filed in the United States District Court of the Southern District of New York in March 1976 charging (i) a conspiracy in unreasonable restraint of trade under Section 1 of the Sherman Act, as well as the intentional torts of (ii) interference with advantageous contractual, pre-contractual and business relationships, and (iii) conspiracy, under the common law of New York. The District Court had original jurisdiction under Section 4 of the Clayton Act and 28 U.S.C. §1337. Federal jurisdiction over the common law claims was based on diversity principles as well as pendant jurisdiction, 28 U.S.C. §1332.

In September 1981, after extensive discovery and motion practice and virtually on the eve of trial, the so-called Gulf & Western ("G&W") defendants* commenced a serial motion that resulted in summary judgment of dismissal in July 1984. Along the way the District Court issued the above cited memoranda an orders as follows:

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* Being Gulf & Western Industries, Inc. of New York; The New Jersey Zinc Company, being a *division* of G&W, Inc.; Gulf & Western International Holding Company and Gulf & Western (Canada) Limited, both being subsidiaries of G&W, Inc.; and Richard W. Hogeland and David M. Koogler, both being officers of G&W, Inc.'s New Jersey division.

In 1982 the court dismissed the Sherman Act claim of plaintiff ("El Cid"). In 1983 it held that the law of Bolivia rather than New York governed the tort claims. In 1984 it held that even if all that El Cid alleged was true, it was not entitled to relief under Bolivian law.

The facts material to the consideration of the questions presented, as shown in the memoranda and orders of the District Court and the record in the Court of Appeals, are as follows:

In 1975 El Cid was a small company located in Costa Rica, incorporated in the Cayman Islands, B.W.I., engaged in mining and timber projects in Latin America, and providing ancillary services in the United States. Two American citizens, Thomas W. Gilkey and Richard L. Bell, constituted its officers, directors and shareholders. Gilkey, its prinicpal, had been engaged in mining and timber projects in Latin America for some twenty years. JA-68, 118-19, 123, 131, 162, 253.

S.J. Groves and Sons Company ("Groves") was a large construction, earth-moving, and strip mining (i.e., similar to placer mining) concern in Minneapolis, Minnesota. Early in 1975 Groves became interested in branching out into mining in Latin America.

The Tipuani Valley of Bolivia, located about 65 miles north of La Paz, is rich in gold. A report circulated among G&W's top management in New York, for example concluded:

> The reserves under consideration in Tipuani will rank among the very richest placer mining ground known to be in existence in modern history.... The Tipuani valley is probably the world's largest reserves of mineable grade.

JA-179-181, 412-13. The portion of the Tipuani Valley area in which the gold is most heavily concentrated is 855 acres known as the Bolgol Concessions ("Bolgol"). JA-182-183, 233.

In March 1974 certain predecessors of El Cid (both being referred to collectively as "El Cid") entered agreements in Florida and Canada with one Helmut Gaensel to purchase his rights to the

Bolgol. Gaensel was then in litigation in the Bolivian courts against defendant Condor Mining, Inc. ("Condor") of New York City over those rights. Condor belonged to a joint venture to exploit the Tipuani gold with all of the other corporate defendants. G&W financed and controlled that joint venture, and the conspiracy that evolved to further it, directly from New York City and, in day-to-day operations, often through their New Jersey Zinc division in Bethlehem, Pennsylvania. Defendant Hogeland, who headed G&W's New Jersey Zinc division, reported to David N. Judelson, G&W's President in New York.* G&W spent some $2,275,000 to further the venture and the conspiracy.

El Cid, oblivious of all this, made preparations to mine the Bolgol if Gaensel won the suit against Condor. Since it was then short of liquid assets, it too sought joint venturers. The principal prospective partner was Groves. Groves sent representatives to La Paz and the Bolgol with El Cid in April and May 1975, after which Groves offered El Cid a "70-30" partnership to work the Bolgol; but El Cid held out for "60-40", with Groves still as senior partner, to which James Walker, the Groves project manager, agreed, subject to certain further conditions. El Cid also lined up a Denver, Colorado businessman named William A. Kilpatrick as a back-up partner on a "50-50" basis. Groves was prepared to invest $3,500,000 to mine the Bolgol; Kilpatrick was prepared to start on a much smaller scale with $350,000 and pay for expansion with gold produced. JA-408-09, 222-23.

El Cid made detailed plans for the front end loaders, tractors, washing plant, dragline and other equipment needed to start mining, and was prepared with Groves to hire additional expertise as needed. JA-74-75. El Cid planned to bring most of the Bolivian gold and/or its proceeds to the United States; and of course Groves or Kilpatrick, who are located here, would do the

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* While G&W is headquartered in New York City, G&W employees directed much of the day-to-day operations of Bolivian gold project through G&W offices in Pennsylvania. The District Court for choice-of-law purposes, chose to ignore the Pennsylvania situs of these G&W employees and focused on New York, the paw in Pennsylvania still being part of the cat in New York.

same. JA-170-71. In the opinion of Clinton L. Miller, El Cid's mining expert, El Cid's preparations starting with either Groves or Kilpatrick passed the test of feasibility to mine the Bolgol for at least twenty years. JA-226-28.

On May 19, 1975, Gaensel won the Bolgol by a final and non-appealable judgment of the Bolivian court, producing "amaze[ment]," "upset," and "general shock" at G&W (JA-414-15), in view of the fact that defendants had sought strenuously to influence the panel of judges while the case was *sub judice*. Defendants' documents show, for example, that three of their agents "know most of the judges concerned on a personal basis, and will have discussion with them at the appropriate time." JA-184-86. Another local agent had telexed G&W on March 5, 1975, JA-188 (see JA-184-91, 194-97,232):

> COURT MEMBER WHO WILL PROTECT THE DECISION IS GOOD FRIEND OF MINE AND IS RELATIVELY UNDER CONTROL. WE HAVE REQUESTED COLLABORATION TO ANOTHER ATTORNEY WHO HAS DEFINITE INFLUENCE ON COURT JEDGE. WE ARE WORKING HARD ON THE CASE.

Defendants, having lost the Bolgol to Gaensel in spite of such efforts, promptly launched a three-pronged attack from New York City to protect the G&W investment and recapture the Bolgol. JA-415. Their documents show that "Plan One" was "to have the property revert to the State and [defendants] be awarded the right to work it under a long term lease," through secretly obtained legislation that would effectively expropriate the rights to the Bolgol. "Plan Two," defendants admitted, was "really only a delaying action" to keep the Bolgol "TIED UP IN LITIGATION" through a suit filed in which "there is no hope of winning it" and the filing of additional "phony lawsuits." JA-192-96-204-05, 415-16, 433.

Third, defendants, well knowning of El Cid's rights to the Bolgol through Gaensel, worked on Gaensel through a week of negotiations in New York City to try to induce him to sell those

same rights to them. Gaensel, however, went instead to Costa Rica and June 25 entered a new agreement with El Cid which superceded his agreements with El Cid of the previous year; it called for El Cid to pay him approximately $1,000,000 (U.S.), with the first payment by El Cid to Gaensel due on July 25, 1975. JA-417-22,142-44. El Cid was at that point dependent on Groves to make the $25,000 payment due to Gaensel on July25 and also to pay the $20,000 it would take to register its new June 25 agreement and perfect its rights to the Bolgol in Bolivia.

Groves sent a project manager, James Walker, and its General Counsel, Robert A. Engelke, Esq., to Bolivia to determine whether to go forward in joint venture with El Cid. Engelke testified on deposition that Groves fully intended to do so if possible, to register the June 25 agreement, and to pay Gaensel the $25,000. Ja-211-14,423.

Defendants, however, embarked on a campaign of intimidation and obfuscation against Groves in Florida and in La Paz. Defendants agents repeatedly told the Groves representatives how G&W were big and determined, had connections in the Bolivian government, and would keep the Bolgol tied up in unending litigation if Groves went forward with El Cid. JA-198, 424-29. It worked. Walker and Engelke finally told El Cid that Groves was "not buying a legal battle ... a can of worms." JA-431. Engelke testified that the legal problems raised by defendants, including the threats and two Plan Two suits that were actually filed, were "the principal reason" why Groves left El Cid. JA-429.

The coup de grace came when a Bolivian lawyer named Augusto Gottret, who, unbeknownst to Engelke or Walker, was actually on defendants' payroll to recapture the Bolgol (JA-195-97), came "out of the woodwork," disparaged Groves' involvement with El Cid, and offered Groves an alternative mining venture. Groves did in fact go forward with that mining venture in Bolivia. JA-206-10, 216, 424-32.

Defendants' United States employees, Hogeland, Koogler, and Ira P. Barsky, Esq., of G&W, Col. V.D. Luehring of Condor, and

their local agents were, from July 13 on, subjecting Gilkey in La Paz to a relentless series of threats, as defendants have partially admitted. JA-432-36. For example, G&W's Koogler told Gilkey, according to Gilkey's testimony, JA-433 (see also 434-35):

> "We are going to have the property. We will harass you. We will sue you. We wil file phony lawsuits. We will do anything within our power to keep you from operating that property. We will discuss this and talk to any partners you may come up with. We will discourage them and we will assure them that they are fighting an unending legal battle."

G&W's Barsky told Gilkey, JA-435:

> "We believe that there are other people like you who have purchased the rights to this property from Mr. Gaensel and there may be as many as ten people." I remember him using that term, "There may be as many as ten people that are going to come out of the grass and we are going to just have to mow everybody down as they appear. We fully intend to do so. . . ."

When Groves told Gilkey they were not going forward with El Cid, Gilkey summoned Kilpatrick, who flew from Denver to La Paz with $52,000 (U.S.) cash in his briefcase, and was himself subjected to defendants' threats and enticements. Kilpatrick did not make the $25,000 payment or register El Cid's June 25 agreement for the Bolgol. This happened in substantial part because Gilkey of El Cid had sought legal advice on those subjects from a Bolivian lawyer named Luis Fernando Valle, in view of the new clouds that defendants had put on the title to the Bolgol. Valle advised Gilkey not to make the payment or register the Agreement, but rather to send Gaensel a "Notarial Letter" saying that the payment would be made when Gaensel removed the clouds from the title. This was bad advice. Unbeknownst to Gilkey or Kilpatrick, Valle, too, was an agent on the G&W payroll, was referred to in many of defendants' telexes as "the expediter", and was defendants' chief agent to effectuate Plan One. Broke and

defeated, Gilkey returned to Costa Rica. JA-217, 416, 436-41. G&W's president, Judelson, was advised in New York on July 30 that defendants were about to sign a new agreement with Gaensel to acquire the Bolgol and required $175,000 from G&W's New York account.

Defendants agreed among themselves to "tie up" and "to assemble as much property as possible, all the way up and down the [Tipuani] river," since if "G&W were going to be involved at all, they wanted to be involved in a big way." JA-233-35. (During and after El Cid's challenge, defendants were seeking $7,000,000 in additional financing in New York from largely New York banks, repayable in Tipuani gold. JA-169-73, 442.) Yet the defendants fell out among themselves and failed to mine the riches of the Bolgol, which, we understand, others are mining very profitably today. JA-442.

REASONS FOR GRANTING THE WRIT

The District Court stated at the outset of its 1982 decision dismissing El Cid's antitrust claim that it

> accept[ed] as established that defendants did indeed use unfair means to deprive plaintiff of the Bolgol Concessions and that the alleged conspiracy among defendants was planned and set in motion in the United States. B-3.

Similarly the Court of Appeals affirmed the dismissal of the antitrust claim" [e]ven if ... defendants' actions unlawfully impaired El Cid's ability to obtain the major financing needed for the contemplated purchase [of the Bolgol]." A-2. But both courts held as a matter of law that defendants need not submit their very possibly "unfair" and "unlawful" conduct ot a trier of fact.

The Court of Appeals directed that its reasoning "shall not be reported, cited or otherwise used" (A-4), so that it will be without effect except upon the victim of the unfair and unlawful conduct. But the District Court, we submit, made bad law that is available to confuse, mislead, and damage one and all. (In the

complex and paradoxical field of antitrust, careful judges, law clerks, and practitioners may be counted upon to couple the facts in the antitrust decision, 551 F. Supp. 626, with the facts in the choice of law decision, 575 F. Supp. 1513, and if they follow this case, reach wrong results.) A review of Shepard's Citations indicates that this may not yet have happened, but we respectfully submit that it would be for the best for this Court to correct these errors and clarify the law before harm befalls.

Point I

The Published Holding on Anti-Competitive Effect Clashes with Sherman Act Decisions of This and Other Courts.

a. *Protection of Competition versus Protection of Competitors.*

The District Court stated, at B-7:

> As to the gold mining industry, plaintiff claims that defendants' predatory conduct has barred all in that industry from a competitive chance at the Bolgol - the key concession in the gold-rich Tipuani Valley.

Supporting plaintiff's claims are defendants' admissions, recited in the Statement of the Case, above, about Plan One to swipe the property through legislation, Plan Two to tie it up in baseless litigation, etc., plus "going to just have to mow everybody down as they appear" and agreeing to "tie up" and "to assemble as much property as possible, all the way up and down the [Tipuani] river." By their nature and effect, these acts are not aimed at one competitor alone. They are calculated to destroy all competition, and to create conditions in which competition cannot exist.

The court continued, at B-9-10:

> . . . plaintiff — in urging us to consider the effect of the alleged conspiracy on the gold mining industry in the Tipuani Valley — would have us focus on the effect on *competitors* rather than on competition. It is

> abundantly clear, however, that the Sherman Act protects competition not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* (1977) 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L.Ed.2d 701 . . . .

What this Court said in the cited passage in *Brunswick* was:

> The antitrust laws, however, were enacted for "the protection or *competition* not *competitors*." *Brown Shoe Co v. United States*, 370 U.S. at 320, 82 S. Ct. at 1521....

We respectfully submit that that statement, taken out of context as it often is, is ambiguous and confusing; that the District Court herein succumbed to the ambiguity and confusion; that it is important for this Court to clear this up; and that this is an excellent opportunity to do so.

Competition does not exist in a vacuum. It exists in a context of real and potential competitors in a geographic and porduct market, or it does not exist at all. Acts that reduce or foreclose competition in a market may *ipso facto* injure competitors, any one or more of whom are entitled to seek redress under Section 4 of the Clayton Act, as El Cid did and Groves and Kilpatrick did not in the present case. But if the statement in *Brunswick* that the antitrust laws protect competition not competitors is read literally, then it repeals Section 4; but of course *Brunswick* does not repeal Section 4.

We understand the *Brunswick* statement to mean that the antitrust laws protect individual competitors from acts, and only from acts, that also impair competition. But acts that may totally destory an individual competitor are not actionable under the antitrust laws unless the very subtraction of that competitor from that market hurts competition in that market. We never claimed that the subtraction of El Cid from the Tipuani gold market would have impaired competition in and for that market: If defendants had fire-bombed El Cid's headquarters, we would not have sued under the Sherman Act. But because in foreclosing everybody, defendants also foreclosed El Cid, El Cid's claim

meets the standards of Sherman Act Section 1 and Clayton Act Section 4.

Some courts have soundly followed this Court's statement in *Brunswick* when one competitor is affected by defendants' acts and competition is not. E.g., *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 134 (2d Cir. 1978), *cert denied*, 439 U.S. 946 (1978). The District Court in this case did not, and here and the Second Circuit did nothing about it. The ambiguity of the often quoted *Brunswick* language should be apparent upon consideration, but evidently it is not always. We respectfully ask this Court authoritatively to clarify it.

b. *This Court Should Resolve the Conflict between This Decision and the Fifth Circuit on Definition of Geographic Market.*

Even though the District Court recognized El Cid's claim that "defendants' predatory conduct has barred all in [the gold mining] industry from a competitive chance at the Bolgol" (B-7) (we also said that its objective was to foreclose the entire Tipuani Valley), the court went on to assert El Cid's "failure to define the relevant geographic market" (B-9); but then it went back to saying that El Cid was "urging us to consider the effect of the alleged conspiracy on the gold mining industry in the Tipuani Valley." B-9. (We had in fact given the court considerable evidence that considering the Tipuani Valley a discrete geographic market of effective competition accorded with geologic and commercial realities. *Brown Shoe Co. v. United States*, 370 U.S. 294, 336 (1962).)

Where someone buys or sells a commodity may be what most laymen consider a "market." But it also accords with commercial realities of effective competition and with the purposes of the Sherman Act to add a source of supply to what may constitute a "market" within the ambit of the Act. The reported decision below refuses to do this. It thus clashes with the Fifth Circuit in *Industrial Investment Development Corp. v. Mitsui & Co., Ltd.*, 671 F.2d 876 (5th Cir. 1982), *vacated and remanded*

for further consideration, 103 S. Ct. 1244 (1983), 704 F.2d 785 (1983), *cert denied*, 104 S. Ct. 393 (1983).

In *Mitsui* the geographic market was Borneo, and the restraint was achieved by underhanded competition for a single source of the product, there timber as here gold. Plaintiffs there alleged that defendants kept them out of the timber business in Borneo by destroying their contractual rights to a timber concession. 671 F.2d at 881. The Fifth Circuit held, at 883:

> There was ample evidence in the record to show that Mitsui-U.S.A. had appropriated much of the business that plaintiff's claim they would have derived from the forestry concession . . .

While the court in *Mitsui* did not pass on the effect on competition in that market because plaintiffs had not been on notice to present their proof (at 880 n. 16), the point here is that the Fifth Circuit could and would have dismissed on the pleadings if those pleadings had been insufficient as to market effect. *Mitsui* thus stands for the proposition that a conspiracy that deprives a competitor of a government concession that is a source of supply in a foreign nation violates the Sherman Act, which is precisely the opposite of the holding here.

The definition of "market," particularly under Section 1 of the Sherman Act, needs further amplification. The clash between the decision below and the Fifth Circuit in *Mitsui* illustrates the need.

c. *The Courts Below Have Rewarded Defendants for Their Success in Crusing Competition, Tipping the Balance against the Victim and in favor of the Predators Contrary to the Dictates of this Court and the Purposes of the Sherman Act.*

The District Court stated, on the issue of whether foreign or interstate commerce was affected by defendants' acts, at B-6:

> The startling thing about the facts and arguments submitted by plaintiff is that . . . there is no suggestion

> that plaintiff, its president, or its predecessors had ever sold an ounce of gold or any other metal in the United States or had made any specific plans to do so.

But this Court made it clear over 60 years ago that there is no requirement whatsoever that El Cid had ever sold an ounce of gold, when it said in *United States v. United Shoe Machinery Co.*, 247 U.S. 32, 53 (1918):

> [N]either the letter of the law nor its purpose distinguishes between strangling of commerce which has been born and preventing the birth of commerce which does not exist.

(As to specific plans to sell gold here, it is judicially noticeable, as we noted below, that the *Wall Street Journal* and *New York Times* quote the price at which gold is brought and sold in New York every business day; selling gold here takes about as much advance preparation as selling shares of IBM. Moreover, the majority of the gold under the venture that defendants destroyed would have gone to Groves in Minnesota.)

Upon the record of El Cid's and Groves' preparations to go forward with the mining venture, which was before the District Court and is summarized in the Statement of the Case, above, we find it incomprehensible that the District Court could hold as a matter of law that all El Cid and Groves had was "a vague and undocumented hope" of bringing millions of dollars and more of gold into this country. The Court of Appeals for the District of Columbia Circuit held on rather similar facts that a trial was required on the issue of preparedness to go forward, in *Neuman v. Vidal*, 710 F.2d 856, 858-860 (D.C. Cir. 1983). Totally convincing, we should think, on the issues of intent and preparedness — see *Neuman* at 858 and the cases there cited — are the facts that but for the conspiracy, El Cid and Groves would have mined the Bolgol together, and after defendants drove Groves away from El Cid, Groves did in fact mine other property in Bolivia.

The Court of Appeals seems to have disposed of El Cid's antitrust claim and all its ramifications upon its observation that

El Cid did not have the $25,000 "token down payment" due to Gaensel on July 25, 1975 in its own pocket and allegedly could not raise that sum — that latter conclusion flying flatly into the face of the record fact that El Cid raised $52,000 (U.S.) cash by summoning Kilpatrick. A-2-3. These conclusions by the Court of Appeals may be unreported, but we ask that they not pass unnoticed. What the court said, in effect, was: Rich and poor may stand equal before the bar of justice except that to assert a large Sherman Act claim, you have to start with $25,000.

The Sherman Act does not say that. It should not say it. It defeats its purpose to say it. We are not aware of any other court that has said it.

The evidence showed, and the lower courts ignored, that but for the conspiracy, El Cid and Groves were going forward as a joint venture. The preparedness of one *was* the preparedness of the other. Each had what the other needed to mine the Bolgol. The Court of Appeals would obviously not have given the short shift to Groves, with its $3,500,000 and mining experience, that it gave to El Cid; but the fortuitous fact that Groves chose not to sue does not diminish one iota the wrongs done by defendants or the resulting injury to El Cid's business and property or the preparedness of El Cid, but for those wrongs, to go forward with Groves, as Groves was prepared to go forward with El Cid. By clarifying the legal issues raised in this case, this Court can also correct a great injustice.

Point 2

Important Choice of Law Issues Warrant Resolution.

While the reasons for granting certiorari on the choice of law questions are perhaps not so strong as they are on the antitrust issues, it does seem important for this Court to consider them because (a) there is no dispute that applicable law is that of the place having the most significant relationship with the subject matter of the alleged torts (*Nader v. General Motors Corp.*, 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970)), (b) the published opinion

of the Distict Court appears on its face to have reversed that standard in applying it to the facts at bar, and (c) it is not necessary for this Court to mine the material facts from the arcana of a voluminous record and the forensics of counsel, since they are summarized in a neat little table, 575 F. Supp. 1515-1516, as follows:

New York

conspiracy meetings held; birthplace and seat of control of the conspiracy
negotiations between defendants and Gaensel
citizenship of two defendants (Gulf & Western and Condor Mining, Inc.)
source of financing for defendants' intended mining activities

Bolivia

conspiracy meetings held
improper and harrassing litigation entered into
undue influence on judges attempted
legislation sought
lawyers suborned
real property situated
transfer of real property occurred.

To this summary we would add only that the acts of conspiracy in Bolivia were ordered and paid for by, from, and for New York.

The salient conclusion from this table is that in perpetrating the intentional torts alleged, the principals acted in New York and the agents acted in Bolivia and New York (this is not an action for land title). It is elementary not to regard the acts of the agents as having more significance to the torts or to the injury or to anything else, than the acts of the principals who direct and control them. Where the puppet masters pull the strings has greater significance than where the puppets dance. When the Administration in Washington sent the Marines into Lebanon and Grenada, for better or worse, the world held the Administration

in Washington, not the Marines in Lebanon or Grenada, responsible. The lower courts would presumably have found the greater significance in Lebanon and Grenada because that is where the agents acted and the land was. But New York was the seat of the conspiracy; New York, accordingly, had the most significant relationship with it.

In an apparent effort to avoid the force of this conclusion, the District Court decapitated the conspiracy, at 575 F. Supp. 1517, as follows:

> Plaintiff relies heavily on the allegation that defendant's New York activities spawned the alleged conspiracy. This, however, establishes no more than a significant relationship with a plot which in and of itself is non-actionable.

This conclusion, we submit, is in conflict with the holding of this Court in *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962) that:

> In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ". . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole...."

Choice of law standards can quickly become a "quagmire" if order is not imposed upon them. See *O'Rourke v. Eastern Airlines, Inc.*, 730 F.2d 842, 846-851 (2d Cir. 1984). We respectfully suggest that it is important for this Court to impose order here.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the orders herein of the Court of Appeals for the Second Circuit.

Respectfully submitted,

MALCOLM H. BELL
Attorney for Petitioner
Prince's Pine Road
Norwalk, CT 06850
203 866-0147

Dated: Norwalk, Connecticut
October 18, 1985

APPENDIX

APPENDIX A

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 11th day of June one thousand nine hundred and eighty-five.

Present:

HONORABLE WALTER R. MANSFIELD,
HONORABLE JAMES L. OAKES,
HONORABLE JON O. NEWMAN,

Circuit Judges.

EL CID, LTD.

Plaintiff-Appellant,

—v.—

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS GRIFFIS & MC OUAT, LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND AND DAVID M. KOOGLER

Defendants-Appellees.

ORDER

El Cid, Ltd. appeals from a judgment of the District Court for the Southern District of New York (Whitman Knapp, Judge) granting defendants-appellees' motion for summary judgment. *See El Cid, Ltd. v. New Jersey Zinc Co.*, 551 F. Supp. 626 (S.D.N.Y. 1982), 575 F. Supp. 1513 (S.D.N.Y. 1983), 588 F. Supp. 125 (S.D.N.Y. 1984). El Cid is a Caymen Islands corporation formed in 1975 in the hope of acquiring gold mining rights in Bolivia. In May 1975 a Bolivian court determined that the rights were owned by Helmut Gaensel, rather than one of the defendants in this case, Condor Mining, Inc. of New York. El Cid contracted with Gaensel to buy the rights for $925,000, with an initial payment of $25,000 required by July 25, 1975. El Cid, lacking funds, sought to interest others in financing the venture, principally S.J. Groves and Sons, a Minneapolis construction and mining company. Ultimately Groves decided not to finance the venture. Gaensel contracted to sell the mining rights to Camino Gold Mines Ltd. of Toronto contingent upon El Cid's default. After El Cid's default Camino also failed to secure needed financing, and the area subject to the mining rights has never been mined by any of the parties to this litigation.

1. Though Judge Knapp may well have been correct in concluding that El Cid failed to present any facts to show an effect on United States interstate or foreign commerce from the alleged actions of the defendants sufficient to predicate antitrust claims, we need not review his ruling since El Cid's antitrust claim fails in any event for lack of any evidence of preparedness to enter the gold mining market, an essential element of a claim of market exclusion. *Hayes v. Solomon*, 597 F.2d 958, 973 (5th Cir. 1979), *cert denied*, 444 U.S. 1078 (1980); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956, (1978). Even if, as the complaint alleges in rather conclusory fashion, defendants' actions unlawfully impaired El Cid's ability to obtain the major financing needed for the contemplated purchase, the inability to raise even a token down payment of less than three precent of the purchase price defeats any claim of preparedness to enter a business requiring not only nearly one

million dollars to purchase mining rights but also extensive capital investment thereafter to mine the property.

2. Though the federal antitrust claim was properly rejected on motion for summary judgment, the District Court was entitled to exercise its discretion to assert jurisdiction over the pendent state law claims, alleging essentially tortious interference with contractual rights. The Court also properly determined that under New York choice-of-law rules Bolivian law governs the state law claims. *See Nader v. General Motors Corp.*, 25 N.Y.2d 560, 307 N.Y.S.2d 647 (1970).

3. The District Court did not err in concluding that El Cid had failed to present facts raising a triable issue of civil liability under Bolivian law. El Cid does not assert on appeal any claim under the Bolivian Civil Code. It relies on the Bolivian Criminal Code, particularly Article 87, imposing civil liability upon those committing penal violations, and Article 303, proscribing obstruction of "the freedom to work." Defendants' expert on Bolivian law, by affidavit and testimony, represented that plaintiff had shown no conduct violating Bolivian law. Plaintiff's expert testified that restriction or obstruction of freedom to work under Article 303 must involve conduct of sufficient gravity to violate "other articles" of the Bolivian Penal Code. El Cid failed to show any such violation. It relies on evidence suggesting that Groves decided against financing the venture in part because of uncertainties created by litigation initiated in Bolivia by one of the defendants. El Cid claims the litigation was baseless. Whether or not the suit had merit, El Cid has totally failed to show that the bringing of a lawsuit creates a basis for damage liability for violating the Bolivian Criminal Code. Plaintiff's expert acknowledged that he knew of no authority under Bolivian law for such a claim. Article 293 of the Penal Code punishes use of a threat that "alarms or causes fear," but El Cid presented no evidence that Groves or its personnel were alarmed or placed in fear by defendants efforts to win the mining rights for themselves.

4. Judge Knapp was correct in ruling that the disappointed contender that brought this lawsuit had shown no basis for receiving money in the District Court.

The judgment of the District Court is affirmed.

s/Walter R. Mansfield

s/James L. Oakes

s/Jon O. Newman

Circuit Judges.

N.B. *Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.*

(JON)

No. 84 -7723

United States Court of Appeals

for the

Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of July one thousand nine hundred and eighty five.

Present:

HON. WALTER R. MANSFIELD
HON. JAMES L. OAKES
HON. JON. O. NEWMAN

Circuit Judges,

EL CID, LTD.,

Plaintiff-Appellant,

v.

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS GRIFFIS & MC QUAT, LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND and DAVID M. KOOGLER,

Defendants-Appellees.

A petition for a rehearing having been filed herein by Plaintiff-Appellant EL CID, LTD.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

Elaine B. Goldsmith
Clerk

APPENDIX B

IN THE

United States District Court
Southern District of New York

76 Civ. 1388 (WK)

EL CID, LTD.,

Plaintiff,

—against—

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS, GRIFFIS & MC QUAT, LIMITED, CAMINO GOLD MINES LIMITED, CONFOR MINING, INC., RICHARD W. HOGELAND and DAVID M. KOOGLER,

Defendants.

MEMORANDUM & ORDER

WHITMAN KNAPP, D.J.

After extensive discovery, the so-called Gulf & Western defendants[1] have brought a motion for summary judgment against the antitrust claim of the second amended complaint. For reasons set forth below, it is conditionally granted.[2]

THE ANTITRUST CLAIM

This case involves eight gold mining concessions [the Bolgol Concessions] located in Bolivia's Tipuani Valley. These concessions are owned by defendant Camino Gold Mines Ltd. [Camino], which does not mine them for gold. It is plaintiff's contention that, had the defendants not prevented it by unfair means from obtaining the necessary funds from its American backers, it – and not Camino – would now be the owner of the Bolgol Concessions. Plaintiff, moreover, asserts that it – unlike Camino – would have mined the concessions for gold.

The antitrust claim at issue is based on section 1 of the Sherman Act, 15 U.S.C. §1, and section 73 of the Wilson Tariff Act which extends the antitrust laws to the importation of goods. 15 U.S.C. §8. It alleges that defendants conspired wrongfully to deprive plaintiff of the Bolgol Concessions. This conspiracy is claimed to have affected, among others, the security markets and commerce in mining equipment and machinery. Complaint ¶ 22. In this connection the complaint states at ¶ 25:

> The acts of the defendants have had and will have a substantial impact on trade and commerce among the several States and with foreign nations, *in particular* but without limitation, *trade and commerce in mining equipment and machinery, in gold, and in the securities of such defendants as are publicly held and traded*. The combination, conspiracy and concert of action alleged herein are between and among persons and corporations who, as agents or principals, are engaged or to become engaged in importing gold and other commodities into the United States; and such combination, conspiracy and concert of action are intended to operate in restraint of lawful trade and commerce. (Emphasis supplied).

THE INSTANT MOTION

It is axiomatic that a motion for summary judgment may not be granted unless, after resolving all ambiguities and drawing

all reasonable inferences in favor of the party against whom summary judgment is sought, there remains no material fact genuinely in dispute. *Filli. Moretti Cereali v. Continental Grain Co.* (2d. cir. 1977) 563 F.2d 563, 565; 6 Moore's Federal Practice ¶ 56.23[3] Accordingly, for the purposes of this motion, we will accept as established that defendanst did indeed use unfair means to deprive plaintiff of the Bolgol Concessions and that the alleged conspiracy among defendants was planned and set in motion in the United States. We will focus at the outset on the pivotal question whether — on the assumption that unfair means were used — their "intended effects" had a sufficient impact upon United States commerce to warrant application of the antitrust laws to this extraterritorial dispute. We answer this first question in the negative. Furthermore, we then go on to observe that, after several years of discovery, plaintiff has failed to submit such evidence as would allow a reasonable jury to find defendants' conduct in depriving plaintiff of the Bolgol Concessions to have had an anticompetitive effect.

THE UNITED STATES CONNECTION

Facts

As noted above, the subject of this lawsuit is a gold mining concession located in Bolivia's Tipuani Valley and now owned by defendant Camino — a Canadian corporation.

Plaintiff is a corporation organized in the Cayman Islands, British West Indies, with offices in San Jose, Costa Rica. It is not authorized to do business in any jurisdiction within the United States, and has no office or place of business here. It has, however, provided investment advice to investors in this country, and has had American citizens as stockholders. Plaintiff's Rule 3(g) Statement ¶ 2.[4] Moreover, plaintiff, its predecessors, and stockholders have generally conducted business in U.S. dollars, plaintiff's only checking account (presumably with a foreign bank) is and always has been denominated in U.S. dollars, and plaintiff's two main backers on the Bolgol venture — S.J. Groves & Sons Co. and William J. Kilpatrick — are both American. Plaintiff's Rule 3(g) Statement ¶ 57.

The cast of defendants includes three that are Canadian: Camino (the vehicle of defendants' Bolivian mining ventures), Watts, Griffis & McQuat, Ltd., and Gulf & Western (Canada). The other defendants, however, are American. As stated above, for present purposes, it must be taken as established that the alleged conspiracy to deprive plaintiff ot the Bolgol was planned and set in motion within the United States. Thus, plaintiff avers that defendant Gulf & Western expended some $2,275,000 in interstate and foreign commerce in this connection; that defendants sought financing of approximately $7,000,000 for the project from New York City banks and financiers, obtaining a conditional commitment in 1975; and that defendants purchased and prepared to ship from California to Bolivia a large walking dragline valued at several hundred thousand dollars. Plaintiff's Rule 3(g) Statement ¶ 45, 47, 48.

All parties, moreover, used airlines, telexes, telephones, and other instrumentalities of United States interstate and foreign commerce and communication in their respective efforts to secure the Bolgol. Plaintiff's Rule 3(g) Statement ¶ 51.

As to the effect on United States commerce, plaintiff avers that, had defendants not wrongfully deprived it of the Bolgol, it and its partners would have purchased the bulk of their mining equipment — some several million dollars worth — in the United States. Defendants having failed to go forward with the venture, these purchases were wholly lost to domestic commerce. Moreover, plaintiff offers documents which suggest that even if defendants had gone forward with the project, they would have purchased most of the necessary mining equipment in Canada, not in the United States. Plaintiff's Rule 3(g) Statement ¶ 49-50.

Plainitff further avers that it would have brought into the United States a large portion either of the gold mined from the Bolgol or of the money received for it. Plaintiff's Rule 3(g) Statement ¶ 57. It concedes, however, that defendants would have, likewise, brought into the United States the fruits of the Bolgol had they not "failed to go forward with the project through their

own missteps and fallings-out..." Plaintiff's Rule 3(g) Statement ¶ 56.

Finally, plaintiff states that its ability to conduct business in the United States and elsewhere has been hindred by defendants' actions, which wrongfully deprived it of "cash flow for implementing such operations." Plaintiffs Answer to Interrogatories, No. 15(c).

Discussion

Plaintiff's claim must fail because its impact on United States commerce is insufficient to warrant the application of the antitrust laws. As to this phase of the defendant's motion, Judge Learned Hand established the focus of inquiry with the oft-quoted statement that:

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. *United States v. Aluminum Co. of America* (2d. Cir. 1945) 148 F.2d 416, 443.

There has been no want of litigation over the question of what must be shown to establish at least *some* "consequences" within the United States. *Timberlane Lumber Co. v. Bank of America* (9th Cir. 1976) 549 F.2d 597, 608 n.12. *See, generally,* 6 Toulmin's Antitrust Laws §31.7. A recent review of the law led Judge Carter to rule that any demonstrable effect would suffice, so long as it was not *de minimus*. Thus, in *Dominicus Americana Bohio v. Gulf & Western Industries* (S.D.N.Y. 1979) 473 F. Supp. 680 he observed at 687:

> According to the *Alcoa* rule, even wholly foreign conduct may come within the sweep of the antitrust laws if it has a sufficient effect on the interstate or foreign commerce of the United States. Indeed, it is probably not necessary for the effect on foreign commerce to be both substantial and direct as long as it not *de minimus*. (Citations omitted.)

Accepting Judge Carter's formulation of the doctrine, we conclude that any effect in the United States of the alleged conspiracy would be, at most, *de minimus.*[5]

Examination of the cases cited by plaintiff on this issue shows that in each of them the defendants were claimed to have conspired to control or to destroy some specific business activity – either in existence or realistically planned – within the United States, or had cut off the importation into the United States of specifically designated goods.[6] It can readily be seen that these cases lend no support to a claim by a foreign plaintiff who has never imported anything into the United States and only alleges the vaguest and undocumented hope of ever doing so.

The startling thing about the facts and arguments submitted by plaintiff is that, despite the assertion that plaintiff and its predecessors had previously conducted "mining operations in Latin America" and that its president had "engaged in mining for many years", *see* Memorandum in Opposition at 10, 16, there is no suggestion that plaintiff, its president, or its predecessors had ever sold an ounce of gold or any other metal in the United States, or had made any specific plans to do so. All that we are given on this score is the vague and undocumented hope that, but for the conspiracy, many "millions of dollars and perhaps billions in gold and/or the proceeds of gold would have flowed from Bolivia" to the United States. No case cited by the plaintiff – nor the totality of all of them – suggests that the alleged frustration of such a vague hope can be deemed to constitute a recognizable consequence within the United States.

ANTI-COMPETITIVE EFFECT

Facts

Despite the completion of discovery [7], there is not enough here to support a reasonable finding that an antitrust violation has indeed occurred. Very little of substance can be gleaned from the papers submitted in connection with the instant motion as to the anti-competitive effect of defendant's conspiracy.

Defendants state flatly that there is no evidence that their actions did in fact restrain either gold mining or gold production. They further observe that plaintiff is not, and never has been, in either the mining equipment or the securities industries. Memorandum in Support of the Motion for Summary Judgment or Dismissal (hereinafter "Defendant's Memorandum") at 15, 17.

In response plaintiff contends that the relevant product markets include both the gold mining and mining equipment industries and that defendants have failed to focus on the commercial realities of the relevant geographic market – the Tipuani Valley in Bolivia. Plaintiff's Memorandum of Law in Opposition to G&W Defendant's Motion (hereinafter "Plaintiff's Memorandum") at 13. As to the gold mining industry, plaintiff claims that defendants' predatory conduct has barred all in that industry from a competitive chance at the Bolgol – the key concession in the gold-rich Tipuani Valley, *Id.* at 21. Plaintiff further observes that defendants are owners of other concessions in the Tipuani Valley – *e.g.*, the Rosario Concessions. These are currently out of production for all practical purposes, but were exploited by defendant Condor from 1966 to 1971. As set forth by the affidavit of James Bates submitted in support of the instant motion, defendants initially contemplated mining the Bolgol in conjunction with three other groups of concessions in the Tipuani Valley. Plaintiff's Supplemental Memorandum in Opposition at 1-2.

As to the mining equipment industry, plaintiff merely states:

> The conspiracy also turned out to have an adverse effect on the mining equipment industry in that El Cid and its partner would have bought several million dollars worth of equipment, and defendants in fact did not. It should also be noted that the plainly predatory intent of defendants' conduct in this case bolsters the conclusion that their conduct had an anticompetitive effect. Plaintiff's Memorandum at 22 (citations omitted.)

Neither side, however, has provided us with any information about the gold market, the gold mining industry, or the mining equipment industry. In particular, we have no information on how or where gold is sold in Bolivia or worldwide; how far afield mining operators generally look for mining equipment, and what governs its selection; what percentage of world-wide or even national production of gold the Bolgol is capable of supplying; and what percentage of world-wide or other sales of mining equipment an operation of the Bolgol's projected size might reasonably be expected to require.

Discussion

Plaintiff has failed to make out a *prima facie* case of antitrust violation. We discard at the outset the line of cases, based on the First Circuit's opinion in *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.* (1st Cir. 1932) 57 F.2d 96, *cert denied*, 286 U.S. 552,, *later limited by George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.* (1st Cir. 1974) 508 F.2d 547, which hold that a conspiracy to eliminate a competitor by unfair means is *per se* a violation of the Sherman Act. It seems to us the better rule is the one enunciated by the Court in *Northwest Power Products, Inc. v. Omark Industries, Inc.* (5th Cir. 1978) 576 F.2d 83, that such conduct rises to the level of a Sherman Act violation only when it has an anticompetitive effect. *Id.* at 90. *See also Eye Encounter, Ind. v. Contour Art, Ltd.* (E.D.N.Y. 1979) 81 F.R.D. 683, 690; *Mr. Hanger, Inc. v. Rizzuto* (S.D.N.Y. 1975) 410 F. Supp. 1158 (dismissed for lack of jurisdiction); *Vogue Instrument Corp. v. Lem Instruments Corp.* (S.D.N.Y. 1966) 40 F.R.D. 497 (summary judgment denied). Thus, in sustaining a grant of summary judgment for a defendant who had concededly conspired to eliminate a competitor by unfair means, the *Norhtwest Power* Court observed:

> [A]bsent some market impact comparable to that which would be forbidden by the law of mergers, the interests protected by the antitrust laws never arise. 576 F.2d at 89.

Compare Whitten, supra, 508 F.2d 547, 567, n.31 (where there is no potential for an actual market effect there can be no liability even for conduct that would otherwise be a *per se* violation of the Sherman Act Section 1).

The difficulty with plaintiff's position in this regard is its failure to define the relevant geographic market. *See Coniglio v. Highwood Services, Inc.* (2d Cir. 1974) 495 F.2d 1286, 1292 ("before there can be a conclusion as to whether there has been...a contract in restraint of trade, a determination must be made as to what [is] the relevant...market") (citing cases). Clearly the relevant product is gold. The plaintiff has suggested nothing to overcome what we believe to be the universally recognized fact that the market for gold is world-wide.[8] Although, as noted, neither party has furnished us with any information about the size of the international gold market, defendants' potential market share is obviously minimal. Therefore, it is difficult to conceive how anything defendants may have done or may plan to do with the Bolgol Concessions – from shutting them down entirely to combining their operation with that of other mines in the Tipuani Valley – could have any noticeable effect on the world-wide market for gold.[9]

Plaintiff seeks to circumvent this difficulty by focussing on the resources of the Tipuani Valley as viewed from the perspective of a gold mining concern. The gold miner, however, is nothing more nor less than a seller of gold on the world market. As Judge Weinfeld aptly observed in *United States v. Bethlehem Steel Corp.* (S.D.N.Y. 1958) 168 F. Supp. 576, 592:

> Any definition of line of commerce which ignores the buyers and focuses on what the sellers do, or theoretically can do, is not meaningful.

Put another way, plaintiff – in urging us to consider the effect of the alleged conspiracy on the gold mining industry in the Tipuani Valley - would have us focus on the effect on *competitors* rather than on competition. It is abundantly clear, however, that the Sherman Act protects competition not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc. (1977)*

429 U.S. 477, 488: *Jarmatt Truck Leasing Corp. v. Brooklyn Pie Co.* (S.D.N.Y. 1981) 525 F. Supp. 749, 750; *Bustop Shelters, Inc. v. Convenience & Safety Corp.* (S.D.N.Y. 1981) 521 F. Supp. 989, 997; *Clarke v. Amerada Hess Corp.* (S.D.N.Y. 1980) 500 F. Supp. 1067, 1074.

We regard as frivolous plaintiff's suggestion that we should consider the effect on the mining equipment industry. The avowed object of defendants' conspiracy was to secure ownership of the Bolgol; any effect it may have had on the mining equipment industry was accordingly fortuitous.[10] Furthermore, it is sheer speculation whether the shift in ownership of the Bolgol from plaintiff to defendants had any effect on the amount of mining equipment purchased, on the source thereof, or generally on competitive conditions in the market for mining equipment.[11]

CONDITIONS FOR GRANTING SUMMARY JUDGMENT

On the facts before us it seems that defendants' motion for summary judgment as to the antitrust claim should be granted. However, plaintiff strongly argues that it might ill serve judicial economy to grant the instant motion and then be faced with a trial of plaintiff's remaining claims — which would require proof of many of the same facts involved in the antitrust claim. In this connection it will be recalled that defendants have already indicated an intent to move for summary judgment on plaintiff's other claims, but that we had ruled that permission for such further motion would be withheld until we should determine whether the instant motion was viable. Accordingly, we shall hold in abeyance entry of judgment dismissing the antitrust claim and direct that defendant serve any further motions for summary judgment on or before the 12th day of Januray, 1983. In the event no further motion is made, or having

been made is denied, we shall hear argument addressed to the specific question of whether partial summary judgment dismissal of the antitrust claim would enhance or impair judicial economy.

SO ORDERED.

Dated: New York, New York
November 30, 1982

WHITMAN KNAPP, U.S.D.J.

FOOTNOTES

[1] The New Jersey Zinc Company, Gulf & Western Industries, Inc., Gulf & Western International Holding Company, Gulf & Western (Canada) Limited, Richard W. Hogelan, and David Koogler.

[2] Since early 1978 the parties have conducted extensive discovery under the supervision of a Magistrate. In September of 1981 the Magistrate recommended that the Gulf & Western defendants be allowed to make the present motion. The motion was briefed and oral argument was held. Before we could rule, however, this action was stayed pending the outcome of unrelated litigation in another court among the holders of plaintiff's outstanding shares concerning the ownership of the corporate plaintiff. That matter has been resolved and the stay in this case has, accordingly, been lifted. Thus, the motion is now ripe for decision.

[3] We are aware, of course, that "summary proceedings in antitrust litigation are disfavored", *Poller v. Columbia Broadcasting System, Inc.* (1962) 368 U.S. 464, but "they are not to be read out of the antitrust laws." *Reading Ind. v. Kennecott Copper Corp.* (2d. Cir. 1980) 631 F.2d 10, 13, n.6.

[4] A Rule 3(g) Statement is a "short and concise statement of the material facts as to which the moving party contends there is no genuine issue to be tried", or as to which the party in opposition contends there are indeed triable issues. *See* Local Civil Rule 3(g) (formerly 9 (g)). Plaintiff's Rule 3(g) Statement refers to certain of its "principals" as being United States citizens. We interpret the term "principals" to mean holders of the outstanding shares of plaintiff's stock.

[5] The *Alcoa* rule — also known as the "intended effects" test, *see Conservation Council of Western Australia v. Alcoa* (W.D.Pa. 1981) 518 F. Supp. 270, 275; *Dominicus Americana Bohio v. Gulf & Western, supra,* 473 F. Supp. at 687 — is the law in this Circuit. However, the rule has not remained unchanged since the mid 1940s when Judge Hand penned that

well-known passage. As Judge Carter himself stated in *Dominicus*, "the effects test alone is inadequate, because it fails to take into account potential problems of international comity." *Id.* A commentator recently thus summarized the legal trend:

> ...American courts...based their decisions to apply American antitrust law to foreign restraints exclusively on the effect of such restraints on United States foreign commerce. Their central concern was to draw the line between restraints that Congress intended to reach and restraints it did not intend to reach...
>
> This attitude has recently given way to an awareness...that courts should weigh foreign regulatory interests...when deciding whether to give extraterritorial effect to American antitrust law. Note, *Foreign Sovereign Compulsion in American Antitrust Law*. 33 Stanford L. Rev. 131, 132-33 (1980) (footnotes omitted).

Accordingly, at least two Circuits — the Third in *Mannington Mills v. Congoleum Corp.* (3d Cir. 1979) 595 F.2d 1287, and the Ninth in *Timberlane Lumber Co. v. Bank of America, supra*, 549 F.2d 597 — have applied the "intended effects" test only "as the first step in a two-step process...in determining whether to assert extraterritorial jurisdiction pursuant to the Sherman Act. ***If such jurisdiction is proper [under the *Alcoa* rule] the court should then use a balancing test that takes into account various foreign relations impact factors in order to determine whether the exercise of that jurisdiction is appropriate." *Conservation Council of Western Australia v. Alcoa, supra*, 518 F. Supp. at 275. *See also Industrial Inv. Development Corp. v. Mitsui & Co.* (5th Cir. 1982) 671 F.2d 876, 884 n.7. In light of our ruling that plaintiff has failed under the "old" *Alcoa* test, we have no occasion to speculate whether our Circuit would follow the trend and thus modify the *Alcoa* rule in accordance with the teachings of *Timberlane* or *Mannington Mills*. *Cf. Dominicus Americana, supra*, 473 F. Supp. at 687-88.

So far as we are aware, the collection of cases cited by plaintiff includes practically all regularly cited decisions on the extraterritorial application of antitrust legislation. We here briefly refer to each of the cases plaintiff has cited. In *United States v. Sisal Sales Corp.* (1927) 274 U.S. 268, among the allegations of the government's complaint were that the domestic commerce of the United States had an annual requirement of two hundred fifty to three hundred million pounds of sisal, all of which the defendants conspired to control; and that in the course of the conspiracy the defendants foreclosed mortgages on, and tock title to, four hundred thousand bales of fiber actualy stored within the United States. *Id.* at 272. In *United States v. National Lead Co.* (1947) 332 U.S. 319, *affirming, United States v. National Lead Co.* (S.D.N.Y. 1945) 63 F. Supp. 513, the government's complaint alleged, among other things, that the importation of titanium pigments was essential to a forty-million dollar domestic manufacturing industry. *Id.* at 517, and that no "titanium pigments entered the United States except with the consent of " one of the conspirators. *Id.* at 522. In *Continental Ore Co. v. Union Carbide* (1962) 370 U.S. 690, the Suprem Court remanded for a new trial, overturning the Ninth Circuit's decision to grant a directed verdict for defendants who had been charged with violating Sections 1 and 2 of the Sherman Act. "The complaint stated that [in the relevant period] the defendants produced over 99% of all ferrovanadium and over 90% of all vanadium oxide [the relevant markets] produced in the United States and that during the same period the defendants sold over 99% of the ferrovanadium and vanadium oxide sold in this country." *Id.* at 693-94 (footnote omitted). It was held that the trial court had erred in rejecting plaintiff's offer to prove that they had been excluded from the Canadian market by a wholly owned subsidiary of one of the defendants "allegedly operating...for the purpose of carrying out the overall conspiracy to restrain and monopolize the vanadium industry." *Id.* at 703. Such offer of proof was ruled relevant evidence as to the allegations of domestic misconduct, but there is no suggestion that the Canadian events – standing alone – would be cognizable under the antitrust laws. *Pfizer, Inc. v. India*

(1978) 434 U.S. 308, merely established that a foreign government is a "person" within the meaning of §4 of the Clayton Act, and has no bearing on the question before us. In *Timberlane Lumber Co. v. Bank of America, supra,* 549 F.2d 597, it was alleged that plaintiff was an Oregon partnership principally involved in the purchase and distribution of lumber at wholesale within the United States and in its importation into the United States for sale and use. *Id.* at 603. *Yentsch v. Texaco, Inc.* (2d Cir. 1980) 630 F.2d 46, dealt with an alleged conspiracy in violation of §1 of the Sherman Act whereby a domestic oil company sought to control the prices changed by its American retailers. In *Industrial Investment Development Corp. v. Mitsui & Co.* (5th Cir. 1982) 671 F.2d 876, the Court of Appeals reversed an order granting summary judgment prior to discovery where it had been alleged that an American company engaged in importing lumber into the United States had conspired to prevent another American company from competing with it. In *Joseph Muller Corp. v. Societe Anonyme de Gerance* (2d Cir. 1971) 451 F.2d 727, "the trade and commerce in the commodity involved originated in the United States and was to be shipped from it to other countries." Id. *at* 729. *In Sanib Corp. v. United Fruit Co.* (S.D.N.Y. 1955) 135 F. Supp. 764, the District Court declined to dismiss as insufficient on its face a complaint by a United States citizen who alleged that a business he had been conductin in New York City had been destroyed by the alleged conspiracy. *Todhunter-Mitchell & Co. v. Anheuser-Busch Inc.* (E.D.Pa. 1974) 383 F. Supp. 586, involved imposition of territorial restraint on distributors of beer in, among other places, Miami and New Orleans. In *Dominicus Americana Bohio v. Gulf & Western, supra,* 473 F. Supp. 680, Judge Carter denied summary judgment prior to discovery where plaintiffs, some of whom were American corporations, claimed to have been prevented from soliciting American citizens to travel from the United States to the Dominican Republic. *Id.* at 688, and further claimed that the use of American transportation facilities had been restricted by the conspiracy. *Id.* at 685. *National Bank*

of Canada v. Interbank Card Ass'n. (S.D.N.Y. 1980) 507 F. Supp. 1113, had to do with a conspiracy to control the use of credit cards which had effects on, among other things, "the continuous use of Master Charge cards in the United States and Canada by cardholders who cross the border, [and] on the clearing activities of the various United States banks in the Interbank system..." Id. at 1120-21.

[7] Plaintiff asserts that certain interrogatories are still outstanding, but specifically disclaims any contention that discovery should not be deemed complete for purposes of this motion. Plaintiff's Memorandum of Law in Opposition to G&W Defendants' Motion at 8.

[8] For these purposes, we join plaintiff in rejecting defendants' contention that Bolivian gold can be sold only to the Bolivian government.

[9] In a different context the Supreme Court observed, "in general restraints upon competition have been condemned only when their purpose or effect was to raise or fix the market price." *Apex Hosiery Co. v. Leader* (1940) 310 U.S. 469, 500. Certainly, we have been given no information which would suggest that control over the Bolgol Concessions by defendants rather than by plaintiff would have any effect on the world-wide price of gold, nor how such control would "suppress or even destroy competition" *Chicago Board of Trade v. United States* (1918) 246 U.S. 231, 238; *Apex Hosiery, supra*, 310 U.S. at 501; *E.J. Delaney Corp. v. Bonne Bell, Inc.* (10th Cir. 1975) 525 F.2d 296, 302, *cert denied* (1976) 425 U.S. 907.

[10] Plaintiff points out that, as things turned out, disputes among the defendants prevented them from exploiting the Bolgol once they had acquired it. Defendants' failure in this regard, however, is clearly independent of the claimed anti-competitive thrust of the conspiracy alleged. *Cf. Schwimmer v. Sony Corp. of America* (2d Cir. 1980) 637 F.2d 41, 48 (*quoting Contreras v. Grower Shipper Ass'n.* (N.D.Cal. 1971) [1971] Trade Cas. ¶ 73,592 *aff'd per curiam*, (9th Cir. 1973) 484 F.2d 1346, *cert denied*, (1974) 415 U.S. 932).

[11] Plaintiff's standing to sue on such an injury is altogether questionable. *See Calderone Enterprises Corp. v. United Artists Theatre Circuit, Inc.* (2d. Cir. 1971) 454 F.2d 1292, 1295; *Reading Ind. v. Kennecott Copper Corp.* (2d Cir. 1980) 631 F.2d 10, 12-13; *Schwimmer v. Sony Corp. of America* (2d Cir. 1980) 637 F.2d 41, 46-47. *But cr. Reiter v. Sonotone Corp.* (1979) 442 U.S. 330; *Blue Shield of Virginia v. McCready* (1982) ____ U.S. ____, 102 S. Ct. 2540, 50 L.W. 4723.

Supreme Court, U.S.
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No. 85-698 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EL CID, LTD.,

Petitioner,

vs.

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS, GRIFFIS & McOUAT LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND, and DAVID M. KOOGLER,

Respondents.

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Questions Presented

1. Are the United States antitrust laws implicated when a Cayman Islands corporation headquartered in Costa Rica fails to obtain title to Bolivian gold mining concessions, title to which is transferred to a Canadian corporation as the result of conduct occurring in Bolivia?

2. Does the fact that a Canadian corporation, rather than a Cayman Islands corporation, obtains title to Bolivian gold mining concessions provide any basis for finding that there was an injury to competition in the United States?

3. Are United States geographic market issues present in a dispute which involves title to Bolivian gold mining concessions where the record does not reveal that any gold from those concessions ever reached United States markets?

4. Where the Court of Appeals, after a full review of the record, has determined that the plaintiff did not have the requisite intention and preparedness to enter into the business of mining gold in Bolivia, should this Court review that factual finding?

5. Is the determination below of applicable state choice of law rules a matter which should be reviewed by this Court?

List Of Parties Pursuant To Rule 28.1

1. The New Jersey Zinc Company, an unincorporated entity, which was a component part of the G&W Natural Resources Group, an unincorporated division of Gulf & Western Industries, Inc. It has no subsidiaries or affiliates other than affiliates owned, directly or indirectly, by Gulf & Western Industries, Inc.

2. Gulf & Western Industries, Inc. has no subsidiaries or affiliates, other than companies wholly owned by it, directly or indirectly, except as hereinafter set forth. The following list includes all subsidiaries and affiliates in which the corporation's current ownership interest, direct or indirect, exceeds fifty percent (50%):

Associates National Bank
Blackjack Mines, Ltd.
Casmo Mining, Ltd.
Future General Corporation
International Overseas Film Services, Inc.
International Overseas Productions, Inc.
Long Road Production (Partnership)
M&R Company (Partnership)
Magicam, Inc.
Madison Square Garden Soccer, Inc.
Newdon Productions (Partnership)
Prentice Hall Hispano America
S-H Disposition, Inc.
Sudbury (Joint Venture)
Trans-America Resources, Inc.
U.S. Ice Productions, Inc.

3. Gulf & Western International Holding Company, formerly known as Gulf & Western Holding Company, is a wholly owned subsidiary of Gulf & Western Industries, Inc. It has no subsidiaries or affiliates other than affiliates

owned, directly or indirectly, by Gulf & Western Industries, Inc.

4. Gulf & Western (Canada), Limited, is a wholly owned subsidiary of G&W Canada, Inc., which is wholly owned by Gulf & Western Industries, Inc. It has no subsidiaries or affiliates other than affiliates owned, directly or indirectly, by Gulf & Western Industries, Inc.

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No. 85-698

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OCTOBER TERM, 1985

EL CID, LTD.,

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VS.

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Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement Of The Case

A. *General Background.*

Petitioner, El Cid, Ltd. ("El Cid"), brought this action for recovery under the antitrust laws. The complaint also asserted pendent state law claims.

The case was extensively litigated in the District Court. After the completion of discovery defendants moved for summary judgment.

Initially, the District Court addressed the antitrust claim and found that it was insufficient because of the lack of any

impact on United States trade and commerce and because of the absence of injury to competition (JA 250-267, 551 F. Supp. 626).

Thereafter, the District Court determined that Bolivian law governed the pendent tort claims (JA 362-394, 575 F. Supp. 1513) and extensive evidence, including affidavits and two days of testimony, was received as to the substantive law of Bolivia (JA 158-159, 326-333, 397-403, 490-797, R 221). The District Court determined that the claims of El Cid pointed to a possible violation of one provision of Bolivian law (JA 362-394, 575 F. Supp. 1513).

El Cid was then directed to marshall its evidence and to demonstrate to the Court that its claims could be factually supported (JA 482-486, 588 F. Supp. 125, R 229). El Cid made such a submission (JA 404-448) and the defendants submitted a response thereto (JA 449-481). The District Court found it unnecessary to consider the responsive submission of the defendants. Instead, based solely on El Cid's submission, the District Court held that El Cid had not adduced sufficient facts to show a violation of Bolivian law (JA 482-486, 588 F. Supp. 125).

A judgment dismissing the action was entered and the Second Circuit unanimously affirmed. A petition for rehearing was denied.

B. *The Facts.*

There is an area on the remote eastern slopes of the Andes Mountains in Bolivia known as the Tipuani Valley which, since the time of the Incas, has been known to contain gold deposits (JA 53).

In Bolivia, gold mining is conducted pursuant to concessions granted by the Bolivian government. A group of eight such concessions (the "Bolgol Concessions") is at issue here. (JA 53).

In the early 1970's, a firm of Canadian geologists, Watts, Griffis & McOuat, Ltd. ("WGM"), and Condor Mining, Inc.,

a New York corporation ("Condor"), began to take steps for the commercial mining of the Bolgol Concessions and a number of adjoining concessions which were either owned or leased by Condor (JA 53-54).[1]

In order to carry the project forward, a Canadian public corporation named Camino Gold Mines Limited ("Camino") was formed (JA 54).

Title to all of the various concessions was to be placed in Camino. At this point in time Condor believed that it owned title to the Bolgol Concessions, which formed one part of the overall project. (JA 54).

Camino, WGM and Condor conducted various studies and determined that financing of the project was beyond their means. In 1974 they approached Gulf & Western Industries, Inc. which agreed to invest by acquiring a block of Camino's stock. (JA 54).[2]

During 1974, the parties became aware that one Helmut Gaensel, through his company, Gaensel Gold Mines, Ltd., (hereinafter collectively "Gaensel") claimed ownership of the Bolgol Concessions (JA 54).

The conflicting claims of Condor and Gaensel resulted in litigation in Bolivia and in May 1975 a Bolivian court ruled that Gaensel, not Condor, held title to the Bolgol Concessions (JA 54-55).[3]

In the interim, and commencing in March 1974, Gaensel had entered into a series of contracts with a Miami lawyer

---

[1] The Bolgol Concessions were only one part of a larger contemplated project (JA 54).

[2] The investment was monitored by The New Jersey Zinc Company ("NJZ"), a component part of G&W's Natural Resources Group. Messrs. Hogeland and Koogler were executives thereof. The other Gulf & Western entities were passive and merely held title to the stock or made loans to Camino as the project progressed. (JA-301-303). These defendants, along with G&W, are collectively referred to as G&W or the Gulf & Western defendants.

[3] El Cid's Petition (p. 5) makes reference to a telex sent in March 1975, some two months before Gaensel won the suit in Bolivia, indicating that a court member "is relatively under control." Nonetheless, Gaensel, not Condor, prevailed.

named Spaseff for sale to Spaseff of the Bolgol Concessions (JA 55). Spaseff allegedly was acting on behalf of a Costa Rican company named Divco, which purportedly assigned its rights to El Cid, a Cayman Islands entity (JA 55). Significantly, El Cid was not even formed until July 21, 1975 (JA 59, 68). It never, of course, had engaged in mining activities or had sold any gold.

In any event, on or about June 25, 1975 Gaensel and El Cid, which then did not exist, entered into a contract for sale of the Bolgol Concessions to El Cid for $925,000 (JA 55, 140-144).[4] Pursuant to that contract, El Cid was required to make an initial $25,000 payment to Gaensel by July 25, 1975 (JA 55, 142).

It is conceded by Petitioner that it did not have any assets. Rather, it needed to raise funds from third parties to pay the $25,000 down payment (JA 166) and to finance development of the Concessions.[5] Further, it appears that neither El Cid nor its predecessor, Divco, had available the $20,000 filing fee required to raise the agreement to the status of a "Public Instrument" (Gilkey e.b.t. pp. 88-90, R 365). This step was required under Bolivian law and the Gaensel-El Cid Agreement was a nullity under Bolivian law until this was done. (JA 364, 329A-329F, 492-498, 533-537, 759, deVries Affidavit Dec. 14, 1982, included in R 221[6]).

After the May 1975 decision in favor of Gaensel, Mr. James Bates, who was an executive of Camino and WGM, went to Bolivia to attend meetings to review the situation. G&W was not represented at those meetings. (JA 288-289, 291-292).

---

[4] The Gaensel-El Cid contract describes El Cid as "now being formed" (JA 140).

[5] Estimates for such development ran well into seven figures (JA 169, 308-309). El Cid's President did not even have enough money to pay his hotel bill in Bolivia (Gilkey e.b.t. at 401, R 367).

[6] This affidavit of Prof. deVries was omitted from the Joint Appendix prepared by plaintiff in spite of defendants' designation thereof for inclusion therein.

Based upon advice of Bolivian counsel for Camino, Condor and WGM, it was decided to pursue further legal proceedings in Bolivia, which counsel said were available. Additionally, Bolivian counsel advised that a Supreme Decree of the Bolivian government would be helpful. Steps were initiated to institute such litigation and to obtain such a decree. (JA 292).

After those meetings, Mr. Bates returned to Canada and advised Ira Barsky, a lawyer on the staff of NJZ, of what had transpired. Mr. Barsky vigorously objected to the decisions taken in Bolivia and indicated his strong preference that negotiations be undertaken with Gaensel to buy his interest in the Bolgol Concessions. (JA 292-293).

Such negotiations did take place in New York in June 1975 and an agreement was reached. Gaensel, however, failed to appear to sign the contract. (JA 308).

In the meantime, on June 25, 1975, Gaensel had signed the agreement with El Cid under which El Cid was required, *inter alia,* to make a modest initial payment of $25,000 to Gaensel on July 25, 1975 (JA 55, 140-144).[7]

On July 15, 1975 Gaensel signed a contract to sell the Bolgol Concessions to Camino. That contract contained an express provision that it was to become effective August 1, 1975, and only if prior contingent commitments of Gaensel to sell the Bolgol Concessions to third parties did not become effective. (JA 55-56, 145-153).

El Cid did not pay Gaensel the required $25,000 and the Bolgol Concessions were sold to Camino (JA 56).

Thereafter, defendants sought to raise financing to conduct commercial mining activities, but their efforts were unsuccessful. As a result, the project, including the Bolgol Concessions, has never been mined. (JA 56). The entire venture has resulted in substantial losses to all concerned.

---

[7] El Cid's total obligation was $925,000 (JA 142).

El Cid's presentation to this Court purports to set forth events which occurred in Bolivia between the time Gaensel won his lawsuit in May 1975 and July 25, 1975 when El Cid failed to pay Gaensel the required $25,000.

It should be noted that the conduct alleged by El Cid resulted from meetings held in Bolivia, was based on advice received from Bolivian counsel and occurred in Bolivia (JA 288-294, 301-303). This conduct supposedly involved matters such as the institution of further litigation in Bolivia, the seeking of a Supreme Decree from the Bolivian government and alleged threats and "dirty tricks," all of which took place in Bolivia.

In point of fact, the record does not support the factual claims made by El Cid.

A major theme of El Cid's presentation involves a company called Groves which El Cid was seeking as a partner in order to obtain the necessary financing. According to El Cid, Groves was subjected to "a campaign of intimidation and obfuscation" (Petition p. 6), the cornerstone of which was the filing of a further lawsuit in Bolivia after Gaensel had won the litigation with Condor.

This claim is entirely unsupported.

Groves' representatives were deposed and their testimony and a review of the record (JA 449-481) makes it clear that:

> Groves was unconcerned about any statements made to it by defendants and examined the proposed project on the merits;
>
> During the course of that examination Groves' independent Bolivian and American attorneys examined the papers with respect to the new litigation involving the Bolgol Concessions and determined that the suit had merit and might result in the reversion of the Bolgol Concessions to the Bolivian Government;[8]

[8] El Cid did not submit the papers in that Bolivian lawsuit to the District Court. Its own expert offered no opinion as to the merits of that suit.

It was this independent determination, along with numerous other problems, which resulted in Groves' decision not to proceed; and

Groves was not committed to finance El Cid and no agreement had been reached between Groves and El Cid.

Similarly, El Cid's presentation refers to some alleged impropriety by defendants in seeking to have the Bolivian government enact a Supreme Decree concerning the Bolgol Concessions. However, nowhere does El Cid demonstrate how that activity had any effect on the ultimate outcome. Significantly, El Cid did not submit a copy of any such proposed Supreme Decree. And, of course, there is no suggestion that it was ever enacted.

El Cid refers to a Bolivian lawyer named Gottret who was retained by one of the defendants (but not G&W) and who allegedly discouraged Groves' involvement with El Cid by offering Groves an alternate mining venture. However, there is no evidence that Dr. Gottret was acting under instructions from the defendants. Further, Groves' representatives testified that Dr. Gottret did not even discuss the Bolgol Concession with them and said nothing to discourage Groves from proceeding with El Cid (JA 465-466).

Equally absurd is the claim that El Cid was given "bad advice" by a Dr. Valle who was allegedly "on defendant's payroll." No evidence supports this except Mr. Gilkey's own statements and there is nothing to link any advice given—which we doubt—with any of the defendants. Certainly, Dr. Valle was not counsel to G&W. Further, defendants' expert testified without contradiction that even if Dr. Valle had done all that was attributed to him, while he might be liable to El Cid, Bolivian law did not recognize any claim against the defendants for having induced Dr. Valle to give El Cid misleading legal advice in Bolivia (JA 577-583).

El Cid's Petition (p. 4) makes reference to "detailed plans" for the purchase of mining equipment. Yet, the record shows that El Cid never placed a single order for such equipment (JA 51-52) and it did nothing more than dream up a list of equipment (JA 74).

El Cid refers (Petition p. 5) to the anticipated testimony of one Clinton Miller as to the feasibility of El Cid's mining plans. The only record reference to support that assertion is to El Cid's answers to Interrogatories. Those answers were prepared by counsel. They do not attach or refer to any report by Mr. Miller. Moreover, no affidavit of Mr. Miller was submitted below.

Finally, El Cid asserts that its "back-up" partner, one William Kilpatrick, withdrew as the result of "threats and enticements" made by the defendants (Petition p. 7). Significantly, when the District Court directed El Cid to make a detailed factual showing of the conduct it relied upon to support its claims, not one word was said about conduct directed toward Mr. Kilpatrick.

Further, the evidence is clear that no conduct of the defendants affected Mr. Kilpatrick. He had assembled $52,000 in cash to take to Bolivia by the July 25 deadline but did not do so solely bcause Gilkey had told him that there was no rush (Kilpatrick e.b.t. pp. 5-7, R-308). Additionally, Mr. Kilpatrick could recall only one conversation with a representative of Gulf & Western, which had absolutely no influence on him (*Id.* at 8-10).

Finally, we would note that Petitioner purports to describe the vast riches of the Tipuani Valley. Yet, the fact remains that these deposits have been publicly known for many years, but have never been mined successfully. The defendants failed in their efforts to achieve commercial production. The record is barren of any evidence to show the existence of the vast treasure described by El Cid or anyone's ability to conduct successful mining operations.

C. *The Decisions Below.*

The District Court addressed the antitrust and tort claims separately.

First, the Court dealt with the antitrust claim which it found to be insufficient as a matter of law. In dismissing that claim, the Court stated (JA 256, 551 F. Supp. at 631):

> The startling thing about the facts and arguments submitted by plaintiff is that, despite the assertion that plaintiff and its predecessors had previously conducted "mining operations in Latin America" and that its president had "engaged in mining for many years," see Memorandum in Opposition at 10, 16, there is no suggestion that plaintiff, its president, or its predecessors had ever sold an ounce of gold or any other metal in the United States, or had made any specific plans to do so. All that we are given on this score is the vague and undocumented hope that, but for the conspiracy, many "millions of dollars and perhaps billions in gold and/or the proceeds of gold would have flowed from Bolivia" to the United States. No case cited by the plaintiff—nor the totality of all of them—suggests that the alleged frustration of such a vague hope can be deemed to constitute a recognizable consequence within the United States.

In dismissing the antitrust claim, the District Court found that there was no discernible impact on United States trade or commerce and that El Cid had totally failed to show any adverse effect upon competition.

With respect to the pendent tort claims, the District Court held that Bolivian law governed. After extensive hearings on Bolivian law, that court determined that certain acts attributed to the defendants might possibly constitute a violation of one provision of Bolivian law. (JA 362-394, 575 F. Supp. 1513). However, when El Cid made a factual presentation detailing what it could prove, the

District Court was unable to find anything to be tried. The Court held (JA 484, 588 F. Supp. at 126):

> After careful consideration of the facts set forth in plaintiff's memorandum—looking at them against the background of all other facts mentioned in the memorandum and taking no account of defendants' memorandum—we cannot conclude that the words and actions attributed to defendants are cumulatively sufficient to present a jury question under our understanding of Dr. Rojas' interpretation of Article 303.

In short, El Cid lost an inquest on its pendent tort claims.[9]

With respect to the antitrust claim the Court of Appeals first noted its agreement that the District Court "may well have been correct in concluding that El Cid failed to present any facts to show an effect on United States interstate or foreign commerce. . . ." The Court of Appeals found it unnecessary to review this matter. On its view of the record, dismissal was appropriate because of the "lack of any evidence of preparedness [by El Cid] to enter the gold mining market. . . ."

As to the pendent tort claims, the Court of Appeals agreed with the District Court's conflict of laws analysis and its conclusion that Bolivian law controlled. It also agreed that El Cid had failed to show any violation of Bolivian law.

* * *

On this record, we respectfully submit that there is nothing to review.

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[9] El Cid's Petition does not include the District Court's opinions on the pendent tort claims. For the convenience of the Court, they are appended to this Brief.

POINT I

This Case Does Not Present Antitrust Issues Worthy Of Review By This Court.

A. *The Conduct Involved In This Litigation Had No Effect On United States Trade Or Commerce. Accordingly, There Is No Antitrust Issue Which Should Be Reviewed By This Court.*

The major premise of the District Court's decision, and one as to which the Second Circuit agreed that the lower Court "may well have been correct," was that the activities involved in this case do not concern or affect United States trade or commerce.

Absent such an effect, there cannot be a violation of United States antitrust laws. Hence, any review of the other issues raised by Petitioner could result only in a theoretical, advisory opinion.

Significantly, Petitioner does not even seek review by this Court of this critical threshold issue.

The facts at bar unequivocally demonstrate that there is no rational nexus between the events at bar and the trade or commerce of the United States. Thus:

> El Cid is a Cayman Islands corporation headquartered in Costa Rica (JA 49, 55);
>
> Neither El Cid, nor its President, nor its predecessor, had ever mined any gold or made United States sales of gold (JA 57, JA 256, 551 F. Supp. at 631);
>
> El Cid was not authorized to conduct business here and had no office or place of business in the United States (JA 49, 55);
>
> Camino, which ultimately obtained title to the Bolgol Concessions, is a Canadian entity (JA 54);

Bolivian law requires that any gold mined from the concessions be sold to the Banco Minero, an arm of the Bolivian government (JA 56, 158-159, 266, 526, DeVries Affidavit December 14, 1982 included in R 221);

The record is barren of any evidence showing that any gold mined from those concessions reached the United States (JA 56-57, 160-161);

None of the defendants were engaged in the business of mining and selling gold (JA 56-57, 160-161);

The conduct complained of was decided upon and occurred in Bolivia (JA 288-292);

The interests of the Bolivian government are involved. Its laws govern the ownership of Bolivian gold mining concessions and its Courts are the appropriate place for determination of issues concerning that ownership.

Given this factual setting, it is clear that this case involves matters not cognizable by our antitrust laws.

In 1945 Judge Learned Hand cautioned:

> We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States. (*United States* v. *Aluminum Co. of America,* 148 F.2d 416, 443 (2d Cir. 1945).

This case is a clear illustration of the wisdom of that caution.

A long line of cases has recognized that antitrust claims cannot be founded upon conduct which has no impact upon United States trade or commerce. *See, e.g., National Bank of Canada* v. *Interbank Card Ass'n,* 666 F.2d 6 (2d Cir. 1981); *Montreal Trading Ltd.* v. *Amax, Inc.,* 661 F.2d 864 (10th Cir. 1981), *cert. denied,* 455 U.S. 1001 (1982); *Mannington Mills, Inc.* v. *Congoleum Corp.,* 595 F.2d 1287 (3d Cir. 1979); *Timberlane Lumber Co.* v. *Bank of America,*

549 F.2d 597 (9th Cir. 1976); *Power East Ltd.* v. *Transamerica Delaval, Inc.*, 558 F.Supp. 47 (S.D.N.Y.), *aff'd*, 742 F.2d 1439 (1983); *Timberlane Lumber Co.* v. *Bank of America*, 574 F.Supp. 1453 (N.D. Cal. 1983); *A.G.S. Electronics, Ltd.* v. *B.S.R. (U.S.A.), Ltd.*, 460 F.Supp. 707 (S.D.N.Y.), *aff'd*, 591 F.2d 1329 (2d Cir. 1978); *Raubel* v. *Engelhard Minerals Chem. Corp.*, 364 F.Supp. 1352 (S.D. N.Y. 1973).

In *National Bank of Canada* v. *Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981), which involved a dispute over which of the parties could issue credit cards in Canada, the Court, in dismissing, noted (at 8):

> Building upon the fundamental "effects" test outlined by Judge Learned Hand in *United States* v. *Aluminum Company of America*, 148 F.2d 416 (2 Cir. 1945), we think the inquiry should be directed primarily toward whether the challenged restraint has, or is intended to have, any anticompetitive effect upon United States commerce, either commerce within the United States or export commerce from the United States. See 1 Areeda & Turner, Antitrust Law § 234b, at 255 (19787). To us the critical factor in deciding this case is that appellants have not shown that enforcement of the exclusivity provision of the license agreement is at all likely to have an anticompetitive effect upon American commerce, either foreign or interstate.
>
> Our jurisdiction is not supported by every conceivable repercussion of the action objected to on United States commerce. Only those injuries to United States commerce which reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation constitute effects sufficient to confer jurisdiction. Cf. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977). While the anticompetitive effects must be shown to outweight any procompetitive effects in order to establish liability,

there must be at least *some* anticompetitive effects to meet the threshold requirement of jurisdiction.

The record here is barren of any evidence to show a "foreseeable threat" to United States commerce or the "linkage, if any, between the behavior objected to and any anticompetitive consequences to United States commerce." (*Id.* at 9).

This is not an antitrust case at all. There is nothing here for review by this Court. Whatever may be the merits of Petitioner's other claims—and they have none—review is unnecessary and inappropriate because the result below was clearly correct. *SS Monrosa* v. *Carbon Black Export, Inc.*, 359 U.S. 180 (1959). *Accord, Hodge* v. *United States*, 368 U.S. 139 (1961).

B. *There Is No Reason To Review The District Court's Determination With Respect To Lack Of Injury To Competition.*

This Court's decision in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) makes it abundantly clear that injury to competition, as opposed to mere injury to a competitor, is the *sine qua non* of an antitrust violation.

We fail to discern what issue as to injury to competition could be reviewed here.

The Bolgol Concessions are government granted monopolies and competition cannot be affected because one company, rather than another, becomes the owner. *See, e.g., A.H. Cox & Co.* v. *Star Machinery Co.*, 653 F.2d 1302 (9th Cir. 1981); *Oreck* v. *Whirlpool Corp.*, 579 F.2d 126 (2d Cir), *cert. denied*, 439 U.S. 946 (1978); *Sitkin Smelting & Refining Co., Inc.* v. *FMC Corp.*, 575 F.2d 440 (3d Cir.), *cert. denied*, 439 U.S. 866 (1978).

There is no "confusion" about the application of *Brunswick* to this case. Rather, the rule is applicable and was properly applied by the District Court.

C. *There Are No Geographic Market Issues Which Warrant Review By This Court.*

El Cid failed "to define the relevant geographic market" (JA 259, 551 F. Supp. at 632) in its presentation to the District Court. As a result, that Court found the market to be "world-wide. (*Ibid.*)" Additionally, El Cid did not supply the District Court "with any information about the size of the international gold market. . . . (*Ibid.*)" In light of this omission, the District Court found it difficult to conceive how any acts involving the Bolgol Concessions "could have any noticeable effect on the world-wide market for gold (*Ibid.*)" or, we might add, on the United States market.

In its Petition here, El Cid asserts (p. 11) that it "had given the court considerable evidence that considering the Tipuani Valley a discrete geographic market of effective competition accorded with geologic and commercial realities." But if the market is the Tipuani Valley, one must wonder why what happened in that market should be of concern to this Court.

The record is devoid of evidence to show how anything that happened in the Tipuani Valley in Bolivia impacted upon an American competitor, or upon trade with the United States, or upon interests protected by our antitrust laws. To define the market as the Tipuani Valley is senseless. That is the source of supply. The only market that could conceivably be relevant to a case of this kind is the importation of gold into the United States. However, this case does not involve that market. There is no showing here as to how that market was affected or as to how there was any antitrust injury suffered in that market.[10]

Who may or may not have been competing in Bolivia is totally irrelevant to antitrust issues which might be of

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[10] El Cid's ever shifting analysis of the nature of the mining "competition" in Bolivia is highlighted in the oral argument before the District Court (R 238) and in our Supplemental Reply Memorandum submitted there (R 219).

concern to this Court. Even assuming, *arguendo,* and contrary to fact, that defendants somehow monopolized the business of mining gold from the Bolgol Concessions, or from the Tipuani Valley, that certainly does not implicate the antitrust laws of the United States.

Nowhere does the record show how United States interests, trade or commerce were affected in any manner—no less in some way protected by the antitrust laws.

El Cid's Petition (pp. 9-10) refers to, and grossly misdescribes, *Industrial Invest. Devel. Corp.* v. *Mitsui & Co., Ltd.,* 594 F.2d 48 (5th Cir. 1979) and 671 F.2d 876 (5th Cir.), *rehearing denied,* 677 F.2d 113 (5th Cir. 1982), *vacated and remanded,* 460 U.S. 1007, *decision on remand,* 704 F.2d 785 (5th Cir. 1983).

In *Mitsui,* a United States plaintiff asserted that it had been foreclosed from obtaining Indonesian timber for importation by the acts of the defendants. The United States plaintiff was able to proffer signed agreements showing the actual existence of a business venture. And, the defendants were actually engaged in importing timber at the time of the acts alleged in the complaint.

Here, El Cid is a foreign entity, which had no firm agreements and none of the defendants had ever imported an ounce of gold.

In *Mitsui,* the District Court had granted defendants' motion for summary judgment prior to any discovery being conducted. In reversing (671 F.2d 876), the Fifth Circuit suggested nothing more than that the plaintiff should have an opportunity to develop its case by pretrial discovery so that the motion could be decided on a full record. Here, El Cid has had every opportunity to develop its case and has failed to do so.

Insofar as the effect on United States commerce is concerned, the *Mitsui* Court noted (*Id.* at 883):

> The competition between two American importers to obtain a source of supply on foreign territory affects the commerce of the United States.

Here, of course, neither El Cid nor Camino is an American importer.

In *Mitsui,* the Court, in denying the preliminary motion, added (*Id.* at 884):

> Here an American corporation with an interest in protection of its import business has allegedly conspired to eliminate a potential American competitor in both the business of purchasing logs in Indonesia and the business of importing lumber and lumber products into the United States.

Mitsui is a far cry from the case at bar.

Certainly, definitional issues concerning the geographic market present no reason to review this case.

D. *There Is No Reason To Review This Case On El Cid's Claim Of Intention And Preparedness.*

It is difficult to imagine an issue less appropriate for review by this Court than El Cid's claim of intention and preparedness. The District Court found that all El Cid had was a "vague and undocumented hope." The Court of Appeals noted El Cid's "inability to raise even a token down payment. . . ." There is not a scintilla of evidence to support El Cid's claim on this score. At best, El Cid asks this Court to review factual findings by the courts below, a practice not engaged in by this Court. *Rudolph* v. *United States,* 370 U.S. 269 (1962); Stern & Gressman, Supreme Court Practice (1971), Sec. 4.14; Robertson and Kirkham's, Jurisdiction of the Supreme Court of the United States (1951), Sec. 333.

Moreover, the only case cited by El Cid on this point, *Neuman* v. *Vidal,* 710 F.2d 856 (D.C. Cir. 1983), involved a situation far different than the one at bar.

In *Neuman,* the plaintiff submitted affidavits from investors indicating an intention to invest in the plaintiff's business. No such affidavits were presented here. Further, the plaintiff and its president had a long and demonstrable track record in the business involved. In contradistinction, here we have "the startling thing . . . that . . . there is no suggestion that plaintiff, its president, or its predecessors had ever sold an ounce of gold or any other metal in the United States, or had made any specific plans to do so (JA 256, 551 F.Supp. at 631)."

And, of course, *Neuman* involved direct competition between American entities, in the United States, for American business.

POINT II

This Court Should Not Review The Application Below Of State Choice Of Rules.

El Cid's final request here is that this Court review the determination below that the pendent tort claims are governed by Bolivian law.

The acts which El Cid alleges as the basis of its tort claims occurred in Bolivia. The lawsuit which El Cid claims was improperly filed involved Bolivian real property, arose out of decisions made in Bolivia by Bolivian counsel who were interpreting Bolivian law and, of course, was filed in Bolivia. The seeking of a Supreme Decree of the Bolivian government was likewise decided upon and carried out in Bolivia. The conduct allegedly directed at Groves and El Cid occurred in Bolivia. The gold mining concessions which are involved here are located in Bolivia, and Bolivian law governs the sale thereof. Contacts with other jurisdictions were minimal and disparate.

The conflict of law rules of the forum state govern choice of law issues as to diversity or pendent causes of action. *Erie R.R.* v. *Tompkins,* 304 U.S. 64 (1938); *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.,* 313 U.S. 487 (1941); *Loebig* v.

Larucci, 572 F.2d 81 (2d Cir. 1978); *System Operations, Inc.* v. *Scientific Games Devel. Corp.,* 555 F.2d 1131 (3d Cir. 1977); *Schoenkopf* v. *Brown & Williamson Tobacco Corp.,* 483 F.Supp. 1185 (E.D. Pa.), *aff'd,* 637 F.2d 205 (1980); *Rental Car of N.H., Inc.* v. *Westinghouse Elec. Corp.,* 496 F.Supp. 373 (D. Mass. 1980); *H.L. Moore Drug Exch.* v. *Eli Lilly & Co.,* 1978-1 CCH Trade Cases, ¶ 62,082 (S.D.N.Y. 1978); *Maltais* v. *United States,* 439 F.Supp. 540 (N.D.N.Y. 1977); *Hall* v. *E. I. DuPont De Nemours & Co.,* 345 F.Supp. 353 (E.D.N.Y. 1972).

Here, of course, that law was the law of New York.

In finding that New York law looked to Bolivian law for the substantive rules concerning El Cid's claims, the courts below merely followed well established New York case law. *Cousins* v. *Instrument Flyers, Inc.,* 44 N.Y.2d 698, 405 N.Y.S.2d 441 (1978); *James* v. *Powell,* 19 N.Y.2d 249, 279 N.Y.S.2d 10 (1967); *Carrolton Associates* v. *Abrams,* 57 Misc.2d 617, 293 N.Y.S.2d 159 (Sup. Ct. 1968); *Bing* v. *Halstead,* 495 F.Supp. 517 (S.D.N.Y. 1980); *Cameron* v. *G & H Street Serv. Inc.,* 494 F.Supp. 171 (E.D.N.Y. 1980); *Church of Scientology of California, Inc.* v. *Green,* 354 F. Supp. 800 (S.D.N.Y. 1973).[11]

Accordingly, it is clear that it was correct to apply New York law to this case and that New York law called for the application of Bolivian law.[12]

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[11] At page 15 of its Petition El Cid's counsel grossly misdescribes Judge Knapp's opinion when he lists the various New York and Bolivian contacts and states that they were so "summarized" by Judge Knapp. Judge Knapp's opinion does contain the summary of factors quoted by counsel, but it is preceded by the statement that (JA 367, 575 F. Supp. at 1515):

> According to the plaintiff's allegations, their relationship to the alleged activities of the various defendants may be grouped thus:

[12] Petitioner does not contend that the courts below erred in finding that El Cid had no viable claim under Bolivian law.

Further, this is a state law issue which is particularly inappropriate for review by this Court. As was noted in *Batner* v. *United States,* 440 U.S. 48, 57-58 (1974):

> In this Court, the parties have argued the state-law questions at great length, each stressing different aspects of the record. We decline to review the state-law question. The federal judges who deal regularly with questions of state law in their respective districts and circuits are in a better position than we to determine how local courts would dispose of comparable issues. (Footnote Omitted).

In *Wolf* v. *Weinstein,* 372 U.S. 633 (1963) this Court dismissed the grant of a writ as improvident because "the controversy over the stock interests primarily implicates Pennsylvania law and presents no federal questions of substance." *Id.* at 636. *Accord, Leroy* v. *Great Western United Corp.,* 443 U.S. 173, at 181 n. 11 (1979); *Runyon* v. *McCrary,* 427 U.S. 160 at 181-182 (1976); *Pierson* v. *Ray,* 386 U.S. 547, at 558 n. 12 (1967); *Ragan* v. *Merchants Transfer & Warehouse Co., Inc.,* 337 U.S. 530 at 534 (1949); *Propper* v. *Clark,* 337 U.S. 472, 486-487 (1949).

There is no basis for review of the state law determination below.

CONCLUSION

It is respectfully submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 15, 1985

* The remaining Respondents join in this brief and authorize its submission on their behalves.

APPENDIX

Decision of Hon. Whitman T. Knapp, Reported at 575 F.Supp. 1513

UNITED STATES DISTRICT COURT
S.D. NEW YORK

No. 76 Civ. 1388 (WK).

EL CID, LTD.,

Plaintiff,

v.

The NEW JERSEY ZINC COMPANY, Gulf & Western Industries, Inc., Gulf & Western International Holding Company, Gulf & Western (Canada) Limited, Watts, Griffis & McOuat, Limited, Camino Gold Mines Limited, Condor Mining, Inc., Richard W. Hogeland and David M. Koogler,

Defendants.

Dec. 15, 1983.

Plaintiff brought action alleging that defendants interfered with its contractual, precontractual and business relationships. On defendants' motion for summary judgment, the District Court, Knapp, J., held that: (1) Bolivian law governed, because plaintiff's alleged injury may have been materially caused by various activities which plaintiff alleged that defendants pursued in Bolivia and the subject of the action, i.e., the mining concessions, was located in Bolivia; plaintiff's allegation that defendants' New York activities spawned the alleged conspiracy established no more than a significant relationship with a plot which in and of itself was nonactionable, and the New York citizenship of two defendants did not add significantly to that jurisdiction's side of the choice of law scale, and (2) com-

plaint was sufficient to warrant a hearing to determine if particular statements allegedly made by defendant were sufficient to permit plaintiff to invoke protection of applicable Bolivian penal statute governing attacks against freedom to work.

Order accordingly.

* * *

Malcolm H. Bell, Norwalk, Conn., for plaintiff.

Kassel, Hoffman, Neuwirth & Geiger by Joseph Einstein, Kimmelman, Sexter & Sobel by Arthur Sobel, Satterlee & Stephens by Henry J. Formon, Jr., Aranow, Brodsky, Bohlinger, Benetar & Einhorn by Susan Belkins, New York City, for defendants.

MEMORANDUM & ORDER

KNAPP, District Judge.

Plaintiff El Cid, Ltd. ("El Cid") has claimed in its amended complaint that the various defendants, acting in concert,[1] engaged in illegal activities in connection with the purchase of the rights to mine the Bolgol mining concessions ("the Bolgol") in Bolivia's gold-rich Tipuani Val-

[1] The defendants assert that each of them played a different role in the transactions which form the background for this action. However, since we assume for the purposes of this motion the truth of plaintiff's allegations that all defendants acted in concert, we will refer to them collectively and not distinguish which defendant performed which actions, except where necessary for the sake of clarity. We will similarly not distinguish among their arguments in opposition to plaintiff's allegations, although we realize that should we reach the merits of this action, certain of the defendants would rely upon their alleged nonparticipation in certain events rather than upon the purported legality of those events, which is the only issue we here find it necessary to discuss.

ley. Plaintiff alleged, first, that defendants' actions violated the Sherman and Wilson Tariff Acts (15 U.S.C. § 1, 15 U.S.C. § 8); second, that defendants interfered with its contractual, precontractual, and business relationships with respect to its own attempts to purchase the right to, and mine, the Bolgol; and third, that defendants engaged in a common-law conspiracy to deprive it of these rights.

In our prior decision, published at 551 F.Supp. 626, we granted summary judgment to defendants on plaintiff's first cause of action. This decision, however, was provisional, and dismissal of the antitrust claim was stayed pending defendants' motions to dismiss the remaining claims.[2] These motions are now before us.[3]

Background

Some of the facts relevant to this motion are set forth in our prior published opinion. Familiarity with them is presumed, and we shall not repeat them here. However, for the instant motion we set forth, in addition, the following facts and contentions.

In March of 1974 plaintiff's predecessors contracted with one Helmut Gaensel and Gaensel Gold Mines & Co., Ltd. ("Gaensel"), a claimant to the Bolgol, to purchase Gaensel's rights if and when his claims to them, then contested in litigation in Bolivia by one of the defendants, should be vindicated. This contract was entered into in Florida. In

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[2] Although the remaining claims are before us only on principles of pendent jurisdiction, the long pendency of this action persuaded and persuades us that it would be inequitable to dismiss them solely because we have found plaintiff's one federal cause of action to be without merit.

[3] This constitutes our second opinion on these motions, and should be considered as amending and superseding our first (unpublished) opinion, dated July 8, 1983.

Decision of Hon. Whitman T. Knapp,
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May 1975 Gaensel's claim was vindicated in the Bolivian courts. In June 1975 Gaensel and plaintiff entered into a second, superseding agreement for the sale of the rights to the Bolgol. Neither this superseding agreement nor the first contract was subjected to the notarization and registration required by Article 171 of the Bolivian Mining Code to make it an *escritura pública,* or a public writing, legally enforceable under Bolivian law. In July 1975 Gaensel contracted to sell these same rights to defendants, which sale was conditioned on plaintiff's failure to satisfy certain of its payment obligations under the June 1975 agreement. Plaintiff did so fail, and the transaction between defendants and Gaensel was completed and the contract between them duly made an *escritura pública.*

Plaintiff asserts that, in their efforts to gain the Bolgol concession, defendants met and conspired in New York to take any means possible to deprive plaintiff of its contract with Gaensel. In furtherance of this plan, according to plaintiff, the defendants attempted to exert improper influence over the Bolivian judge before whom the Gaensel litigation was pending; met with Gaensel while his contract with plaintiff was still pending; drove away plaintiff's intended source of financing for its projected mining ventures; engaged in baseless and harassing litigation in Bolivia; sought legislation in Bolivia, in the form of a Supreme Decree, to the effect that title to the Bolgol was theirs; and suborned Bolivian attorneys, who gave plaintiff faulty legal advice, thereby causing it to refrain from raising its contract with Gaensel to a judicially enforceable *escritura pública.*

Defendants admit that they pursued litigation and legislation in Bolivia. However, they deny the existence of any conspiracy to deprive plaintiff of its rights, and further deny that any illegal action whatsoever was taken at any stage of the proceedings.

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In the instant motion, defendants contend that the law applicable to plaintiff's tort claims is that of Bolivia, which, they assert, does not recognize the torts alleged by plaintiff and further does not provide for criminal or civil sanctions for any of the actions which plaintiff attributes to them. We find that defendants are correct in their first assumption, and hold that plaintiff's allegations must be governed by the substantive law of Bolivia. Both plaintiff and defendants have relied upon the testimony of experts in the law of that country: plaintiff upon Dr. Fernando Rojas Hernandez, a Bolivian attorney; defendants on Professor Henry DeVries of Columbia University. By the law of this case, as set forth in our unpublished Memorandum and Order of July 8, 1983, we have limited our consideration of that law to those statutes relied upon by Dr. Rojas in his affidavits on this motion.[4] We conclude that the facts alleged by plaintiff—drawing all inferences in its favor—would be sufficient to establish a valid cause of action under one such statute. We accordingly deny defendants' motion for summary judgment and set the case down for trial solely to determine the disputed material issues of fact raised by defendants' denials of plaintiff's allegations as to this single statute.

Choice of Law

In choice-of-law questions where federal jurisdiction is based on diversity or pendent jurisdiction, a federal court must be guided by the rules of the jurisdiction in which it sits. *Klaxon Co.* v. *Stentor Elec. Mfg. Co., Inc.* (1941)

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[4] In that decision, we scheduled a hearing at which plaintiff's expert might testify, if he so chose, on his interpretation of Bolivian law, with the proviso that any such testimony would be "confined to [his] explanation of the assertions contained in his affidavits now on file . . . [no] new material will be considered." Memorandum and Order at 22. This hearing was held on September 12, 1983.

313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477; *Hall* v. *E.I. DuPont deNemours & Co.* (E.D.N.Y.1972) 345 F.Supp. 353; *Maltais* v. *United States* (N.D.N.Y.1977) 439 F.Supp. 540. The New York courts—whose law thus governs—apply to tort actions the law of the jurisdiction with the "most significant relationship" with the subject matter of the alleged tort. *Nader* v. *General Motors Corp.* (1970) 25 N.Y. 2d 560, 307 N.Y.S.2d 647, 255 N.E.2d 765; *Church of Scientology of California, Inc.* v. *Green* (S.D.N.Y.1973) 354 F. Supp. 800. We turn, therefore, to the relationships to the alleged torts of the various jurisdictions which figure in this action.

We note at the outset that although the continent-and globe-spanning domiciles and activities of the parties in the action before us have touched many jurisdictions, only three—Bolivia, New York and Costa Rica—are asserted to have any significant connection to the events before us for choice of law purposes. According to plaintiff's allegations, their relationship to the alleged activities of the various defendants may be grouped as follows:

New York

conspiracy meetings held; birthplace and seat of control of the conspiracy
negotiations between defendants and Gaensel
citizenship of two defendants (Gulf & Western and Condor Mining, Inc.)
source of financing for defendants' intended mining activities

Bolivia

conspiracy meetings held
improper and harassing litigation entered into
undue influence on judge attempted
legislation sought

lawyers suborned
real property situated
transfer of real property occurred

Costa Rica

location of plaintiff when it suffered injury
contract of June 25, 1975 signed by plaintiff and Gaensel

Defendants contend, and we agree, that the above allegations demonstrate that Bolivia has numerous and significant contacts with the torts alleged. According to these allegations, practically all the "overt acts" performed by defendants in furtherance of their illicit goals occurred in that country. Not all of these activities, according to plaintiff, were successful—the alleged attempted use of undue influence on Bolivian judges, for example, did not prevent Gaensel from gaining title to the Bolgol in the original suit. We find that they were, nonetheless, important to defendants' efforts to gain control of the Bolgol; and, in addition, that the very existence and quantity of these activities indicate the strength of the link between Bolivia and the defendants' alleged tortious conduct.

It has been held with respect to common-law conspiracy that "[t]he liability is in tort, but the conspiracy is not a tort. The injury flowing from the conspiracy is the tort." *Albert Levine Associates* v. *Bertoni & Cotti* (S.D.N.Y. 1970) 314 F.Supp. 169, 171. We find that plaintiff's alleged injury may well have been materially caused by the various activities which it alleges defendants pursued in Bolivia. For example, plaintiff asserts that it failed to raise its contract with Gaensel to a judicially enforceable *escritura pública* on the recommendation of Bolivian counsel who were paid by defendants. Similarly, the Bolivian litigative and legislative actions taken or sought by defen-

dants, whether successful or not, are alleged to have given defendants the time required to proceed with their machinations and to gain the Bolgol for themselves.

We reject plaintiff's contention that these actions, "though reprehensible in execution, were not primary to the conspiracy's success." Plaintiff's Answering Affirmation at 3. We further reject its suggestion that this success was achieved through defendants' negotiating with Gaensel in New York, conferring and contracting with him in Miami, and driving off the principal source of plaintiff's anticipated funding "as initiated . . . from the Pennsylvania offices of G & W, Inc." *Id.* While some of these actions may indeed have had an effect on defendants' success in obtaining the Bolgol, we are unconvinced that they were the "main steps by which the conspiracy succeeded." *Id.* The injury claimed by plaintiff—the deprivation of the right to mine the Bolgol—occurred principally as a result of defendants' obtaining this right in its place. The driving off of the primary source of plaintiff's funds, while perhaps detrimental to plaintiff's chances of acquiring the mining concessions, does not strike us as being of the same decisive or damaging nature. Defendants' negotiations with Gaensel in New York, since they did directly affect defendants' ability to acquire the Bolgol, pose a more serious issue. However, as discussed below, we do not find that this single activity is more crucial to defendants' success than the various actions which occurred in Bolivia. Finally, while the signing of the contract between Gaensel and defendants in Miami was certainly important to defendants' success—and plaintiff's failure—in obtaining the Bolgol, we note that this was the only event to occur in that jurisdiction; and that plaintiff apparently has not considered it significant enough to warrant a contention that the substantive laws of Florida should control.

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In sum, we find plaintiff's assertion that the actions taken in Bolivia were comparatively unimportant to be wholly against the weight of the evidence before us. Insofar as we understand plaintiff to suggest that any activities which occurred in Bolivia are, as a matter of course, entitled to lesser consideration because no party to this action is a domiciliary or citizen of that country, we can say only that we have been referred to no authority for this contention, and find it untenable.

Further supporting defendants' assertion that Bolivian law is controlling is the fact that the subject of this action —the golden egg itself—is real property located in Bolivia. It is well settled that where rights to real property are in issue, the law of the situs of the property control. *Carolton Associates* v. *Abrams* (Sup.Ct.N.Y.Cty.1968), 57 Misc. 2d 617, 293 N.Y.S.2d 159. Although this action sounds in tort, and neither party seeks to have the rights to the Bolgol determined here, we think that this well-established choice of law rule is, while not determinative (as defendants imply) at least important to our consideration. Of similar significance is the undisputed fact that the mining of gold in Bolivia, and all rights and activities connected with it, are strictly regulated by the Bolivian government.

We reject plaintiff's contention that New York's connections to this action outweigh those of Bolivia.[5] Plaintiff

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[5] Plaintiff urges the novel proposition that, as between New York and Bolivian law (as the latter is interpreted by defendants) there can be no conflict. Plaintiff, pointing to defendants' contention that there exists no Bolivian law forbidding any of their alleged conduct, argues that while a law may conflict with another law, it cannot conflict with the absence of a law. Plaintiff cites in support of his attractively simple suggestion several wholly inapposite cases which in actuality hold that no conflict exists where the law of one jurisdiction reflects a governmental policy or interest, while the law of another reflects none. It is thus accurate, under these cases, to

(footnote continued on following page)

relies heavily on the allegation that defendants' New York activities spawned the alleged conspiracy. This, however, establishes no more than a significant relationship with a plot which in and of itself is non-actionable. *Albert Levine Associates, supra.* Despite plaintiff's allegations that "G & W, Inc. controlled, financed and directed [the conspiracy] from New York," Plaintiff's Memorandum of Law in Opposition at 1, the fact remains that plaintiff has failed to demonstrate a close connection between New York and "the injury flowing from the conspiracy," *Albert Levine Associates, supra,* 314 F.Supp. at 171. Plaintiff has provided no evidence that meetings held in New York were crucial while those held in Bolivia were not; nor any evidence as to how the alleged control from New York was exerted, or what actions were taken in exerting it. In fact, the sole concrete activity which plaintiff sets in New York is the series of negotiations between defendants and Gaensel during which the defendants allegedly laid the groundwork for seducing Gaensel into abandoning his commitment to plaintiff—a process consummated not in New York but in Miami. These meetings, while important to defendants' success in gaining the Bolgol, constitute but one action and do not convince us that New York bears the necessary connection to the events alleged.

Similarly, with respect to plaintiff's allegations of interference with business, contractual and precontractual relations, we reject plaintiff's contention that the tortious conduct centered around New York. This position flies in the face of reason in light of the fact that New York was

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(footnote continued from previous page)

say that the absence of a *policy* cannot conflict with a *policy*. However, plaintiff does not argue that Bolivia's purported lack of regulation demonstrates the absence of a policy, and we do not address that issue.

the locale of so few of the activities which allegedly so interfered, or led to such interference. We do not by this finding minimize the importance of plaintiff's allegations that the defendants lured Gaensel into breaking his contract with plaintiff and entering improperly into a contract with them. However, the fact that this allegedly occurred in New York simply does not establish that New York, above all other jurisdictions, was the primary location of defendants' activities or the torts or injuries to which they allegedly led.

Nor does the New York citizenship of two defendants add significantly to that jurisdiction's side of the choice of law scale. Plaintiff attempts to bolster its position by making much of the roles of these two defendants in the alleged conspiracy. According to plaintiff, defendant Gulf & Western masterminded and controlled the entire conspiracy from its seat in New York,[6] while defendant Condor Mining, Inc. was active in the conspiracy and, as the company which actually contracted with Gaensel for the Bolgol, brought defendants' schemes to fruition. However, the New York citizenship of these entities, in and of itself, does not create a sufficiently significant contact for choice-of-law purposes. Certainly New York may express an interest, cognizable for choice of law inquiries, in regulating the conduct of its citizens. However, plaintiff has failed to adduce any authority for the proposition that in a situa-

[6] Plaintiff's Statement Pursuant to Rule 3(g) at 2-3. Gulf & Western, contrary to this assertion, claims that the Bolgol affair "was a small investment, handled independently by [defendant New Jersey Zinc] through its executives in Bethlehem, Pennsylvania, and one with which G & W in New York had no real contract." Affidavit of David N. Judelson at 3. Watts, Griffith & McOuat, the entity which actually acquired title to the Bolgol, has responded to plaintiff's allegations by pointing out that it is a Canadian corporation with its principal (and only) place of business in Toronto, Ontario.

tion such as that before us "New York has an interest in policing the conduct of its residents within the state to see that they don't harm people outside the state who are not New Yorkers." Tr. of February 18 at 34.

Plaintiff relies principally on *Intercontinental Planning, Ltd.* v. *Daystrom, Inc.* (1969) 24 N.Y.2d 372, 300 N.Y.S.2d 817, 248 N.E.2d 576. This reliance is misplaced. In *Daystrom* the New York Court of Appeals found that New York had a public policy of protecting its "position as an international clearing house and market place" which gave it an interest in policing contracts entered into by New York brokers and their agents whose services were rendered in New York. This provides no support for plaintiff's far-reaching contention that New York has a paramount interest in applying its law whenever a business entity there situated commits a tort anywhere against anyone.

Plaintiff is similarly unaided by its quasi-interest analysis contention that if, as defendants assert, Bolivian law does not prohibit the actions allegedly taken by them, this is an "unfair or anachronistic" policy which should not be tolerated by a New York court. Whatever the state of Bolivia's law, it does not establish a "foreign immunity" like that rejected in *Haehl* v. *Village of Port Chester* (S.D. N.Y.1978) 463 F.Supp. 845, 849, on which plaintiff relies. Further, plaintiff has not demonstrated to us that such a state of law is in fact "anachronistic" or, indeed, that it is "unfair" to any group whose membership includes anyone other than plaintiff itself.

The remaining cases on which plaintiff relies are similarly unavailing. Some (like *Daystrom* and *Haehl*) concern specific situations or categories of actions—into which this action does not fit—in which New York has articulated an express public policy; while the others exhibit "a signif-

icant relationship" between New York and the subject of the action quite apart from the parties' citizenship.[7] We are, however, aware of no case in which New York has expressed the sort of interest hypothesized here by plaintiff based solely on the New York citizenship of one or more defendants, in the absence of any substantial connections between New York and the tort itself. Nor can we discern such a connection from the fact that defendants obtained from New York sources some or all of the money to finance their Bolivian activities. The fact that this financing was helpful to those activities does not necessarily mean that it is important, for choice of law purposes, in the context of the other activities above discussed; and we cannot in fact say that the location of the source of defendants' financing is nearly as important a "contact" as the various activities which plaintiff ascribes to Bolivia.

Plaintiff argues, as an alternative choice-of-law theory, that even if Bolivia has the most significant relationship to the torts alleged, the law of Costa Rica is to be preferred

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[7] *Rudin* v. *Dow Jones & Co.* (S.D.N.Y. 1981) 510 F.Supp. 210 (defendant's activities upon which the action focused were centered in New York); *Kristinus* v. *H. Stern. Com. E. Ind., S.A.* (S.D.N.Y. 1979) 463 F.Supp. 1263 (contract to be performed in New York); *Pan American World Airways, Inc.* v. *Boeing Company* (S.D.N.Y. 1980) 500 F.Supp. 656 (*plaintiff* incorporated and headquartered in New York; relevant conduct occurred in New York); *O'Keeffe* v. *Bry* (S.D.N.Y. 1978) 456 F.Supp. 822 ("a substantial part, if not all" of New York defendant agent's conduct occurred in New York); *Thorn* v. *New York City Department of Social Services* (S.D.N.Y. 1981) 523 F.Supp. 1193 (plaintiff seized in Pennsylvania, held in New York for six months); *Chila* v. *Owens* (S.D.N.Y. 1972) 348 F.Supp. 1207 (host-guest liability); *Johnson* v. *Hertz Corp.* (S.D.N.Y. 1970) 315 F.Supp. 302 (New York statutes "express a policy aimed at protecting innocent victims of New York vehicle registrants"); *Kunstsammlungen zu Weimar* v. *Elicofon* (E.D.N.Y. 1981) 536 F.Supp. 829, *aff'd* (2d Cir. 1982) 678 F.2d 1150 (transfer of personal property governed by location of property in New York).

because the plaintiff was located there when it suffered injury. This fact of location, plaintiff argues, makes Costa Rica the *locus delicti*[8] Plaintiff's position essentially boils down to an assertion that in a choice of law determination the jurisdiction in which the plaintiff is located at the time of injury is to be given especial weight, solely because the plaintiff was located there. The cases cited by the plaintiff for this proposition, however, do not demonstrate so narrow a focus. While these cases have indeed applied the laws of the jurisdictions in which the plaintiffs were located, those jurisdictions were, in addition, the sites of other events or circumstances crucial to the causes of action themselves. *Hargrave* v. *Oki Nursery, Inc.* (2d Cir.1980) 636 F.2d 897, *reh. den.*, 646 F.2d 716 (injury occurred, for jurisdictional purposes, in the state where plaintiffs were doing business, defendants made misrepresentations about merchandise, and the merchandise was shipped); *Vanity Fair Mills, Inc.* v. *T. Eaton Co.* (2d Cir.1956) 234 F.2d 633 (location of allegedly fraudulent activity; passing off of a product occurs where consumers mistakenly buy wrong product); *Albert Levine Associates* v. *Bertoni & Cotti, supra,* 314 F.Supp. 169 (officer of foreign defendant came to New York, conspired in New York with New York defendant to refuse to sell to plaintiff, transmitted this decision to plaintiff in New York); *Bing* v. *Halstead* (S.D.N.Y. 1980) 495 F.Supp. 517 (plaintiff alleged emotional distress caused by letter which she received and read in country where domiciled).

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[8] We note that this theory was not seriously presented prior to oral argument. Despite the appearance of a reference to Costa Rican law in one of plaintiff's many briefs, counsel for plaintiff several times assured us that this was purely illustrative and not indicative of any legal contentions. However, we reject defendants' claims of prejudice from the timing of plaintiff's current assertions, in light of the ample opportunity provided to all parties to present supplemental arguments.

The authority marshaled by plaintiff thus does not contradict the formulation upon which we continue to rely: "that in the sphere of commercial torts, the situs of the injury is 'the place where the critical events associated with the dispute took place'." *MIJE Associates* v. *Halliburton Services* (S.D.N.Y.1982) 552 F.Supp. 418, 419, *quoting Spectacular Promotions, Inc.* v. *WING* (E.D.N.Y.1967) 272 F.Supp. 734, 737.[9] In the instant case the country in which plaintiff was located had no connection to the tort or any of the actions complained of. Nothing of any import happened in Costa Rica: no meetings were held, no financing sought, no allegedly illegal acts taken. The fact that Costa Rica was the location of the signing of the June 25, 1975 contract between plaintiff and Gaensel seems to us irrelevant. The action before us is not one to enforce or take any action with respect to this contract, but rather is based on the allegedly tortious activities of persons not parties to that contract. These persons and activities, as we have said, all lacked any connection to Costa Rica or any events which there transpired. Plaintiff has presented us with no case, and we know of none, in which residence or location *alone* has been found to establish the controlling jurisdiction for choice of law purposes. We therefore reject its contention that the law of Costa Rica applies to the action before us.

Bolivian Law

We turn now to defendants' contention that plaintiff's allegations against them, even if true, do not state a cause

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[9] Significantly, the court in *Bing, supra,* turned to the question of the *lex loci delicti* only after determining that, other than the *locus delicti* no other jurisdiction "has a compelling interest in applying its own law," 495 F.Supp. at 520. In the instant action, on the other hand, as we have noted, one jurisdiction—Bolivia—does indeed have such an interest.

of action under Bolivian law. In that connection, we note that under Federal Rule of Civil Procedure 44.1 any determination we might make as to Bolivian law would be "treated as a ruling on a question of law." Such a determination may thus be made in a motion for summary judgment, despite the existence of material disputes between the parties.

Defendants contend that the acts of which plaintiff accuses them do not set forth a cause of action under any Bolivian statute.[10] Dr. Rojas, plaintiff's expert on Bolivian law asserts in his affidavits that an action might indeed be maintained in a Bolivian court under any of the following four such statutes:

Civil Code

Article 966. Any man who causes injury to another is obligated to compensate him for it.

Article 967. Everyone is liable not only for the injury caused by his act, but also for that caused by his negligence or imprudence.

Penal Code

Article 303. (Attacks against the freedom to work)

Whoever impedes, obstructs or restricts the freedom to work, to exercise a profession or office, commerce or industry, incurs prison of one to three years.

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[10] Defendant makes much of the fact that Bolivian law does not recognize the precise torts alleged in the Complaint: namely, interference with contractual, precontractual or business relations or common-law conspiracy. We find this to be of no moment. At the time plaintiff framed its pleading, it did not expect that the law of Bolivia would be applied to its allegations. We therefore consider sufficient the existence of any cause of action, whether or not equivalent to those named in the Complaint, provided of course that it is based upon the factual allegations included in the complaint.

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Article 87. (Civil Liability)

> Any person liable for a penal offense is also liable civilly and is obligated to compensate for the economic and moral injury caused by the delict.[11]

Penal Code Article 87 does not, of course, provide an independent cause of action. We therefore need consider only Civil Code Articles 966-967 and Penal Code Article 303.

With respect to Articles 966 and 967, Professor DeVries, defendants' expert, testified that

> these articles are, in effect, an appendage to the Penal Code. What they in effect create is vicarious liability . . . or liability for what they call acts or damages caused by things, but the substantive duty must be found in the penal law [which] embraces many of the situations which we call personal injury tort.

Tr. of March 1 at 10. Subsequent to this testimony, Dr. Rojas testified that liability under a separate *penal* statute is not a prerequisite for liability under Articles 966 and

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[11] These quotations are agreed to be accurate translations from the Spanish, which reads as follows:

> Art. 966. Todo hombre que causa a otro algun daño esta obligado a repararlo.
>
> Art. 697. Todos son responsables no solo del daño causado por su hecho, sino tambien del que causado por su hecho, sino tambien del que ocasiona su negligencia o imprudencia.
>
> Art. 303.—(*Atentados contra la libertad de trabajo*)
>
> El que impidiere, obstaculizare o restringiere la libertad de trabajo, profesión u oficio, comercio o industrial, incurrirá en reclusion de uno a tres años.
>
> Art. 87.—(*Responsabilidad Civil*)
>
> Toda persona responsable penal mente, lo es tambien civilmente y está obligada a la reparación de los daños materiales y morales causados por el delito.

967. Tr. of September 12 at 145. Professor DeVries chose not to rebut this statement, nor did he contradict our assumption, stated on the record, that his meaning was probably rather that a violation of some other statute, penal or civil, had to be found before Articles 966 and 967 would be applicable. Tr. of September 12 at 148, 152, 154, 155, 156. Dr. Rojas agreed that these Articles would not come into play unless and until there had been some determination that the party against whom they were to be invoked had committed some wrongful or illegal act. Tr. of September 12 at 152. Dr. Rojas, however, insisted that a Bolivian court might invoke these Articles without pointing to another specific statute which a defendant had violated. He cites in support of this position the Bolivian commentator Raul Romero Sandoval:[12]

> the illegal civil acts are not listed in the Civil Code nor have they their own name. They are as numerous and unforeseeable as the diverse circumstances that life itself causes and creates. Therefore, there shall be an illegal civil act every time that a person suffers damage caused by the fault of another person.[13]

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[12] Dr. Rojas testified, and Professor DeVries did not dispute, that the writings of various authors learned in legal subjects occupy much the same place in Bolivian law, and have much the same influence with Bolivian courts, as may be ascribed to case law and precedent in our legal system. Tr. of September 12 at 144, 157, 210-211.

[13] Pero los hechos ilicitos civiles no estan catalogados en el Código civil ni tienen un nombre propio: son tan numerosos e imprevisibles como las diversas circunstancias que la vida mima provoca y crea; de ahí que habrá ilícito civil toda vez que una persona sufra daño a causa de la culpa de otra persona.

Raul Romero Sandoval, *Derecho Civil* (Los Amigos del Libro, La Paz, Bolivia, 1983) p. 402. The English translation, provided by Dr. Rojas, was not contested by Professor DeVries.

This, however, merely begs the question, for when is a person legally at "fault?" The treatise-writer Montellano states:

> Fault is the non-performance of a preexisting obligation which gives rise to reparation when it causes injury to another. . . . When an act is not expressly prohibited by law, it cannot be illicit, a necessary condition for it to be a fault.'[14]

This latter sentence is similar to Article 32 of the Bolivian Constitution. "No one shall be obliged to do what the Constitution and laws do not mandate, or not to do what they do not prohibit." [15] And, according to Romero:

> [W]hen the pre-existing obligation is created by contract, the fault is contractual; if that pre-existing obligation has been established by statute, the fault is delictual or quasi-delictual. . . . Fault, in addition, can consist in an act or an omission.[16]

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[14] *Capitulo II "La Falta"*

1. Falta es el incumplimiento de una obligación preexistente, que da origen a la reparación cuando causa un daño a otro.

* * * * *

Cuando un hecho no esta expresamente prohibido por la ley, no puede ser ilicito, condición necesaria para constituir falta . . .

Julian V. Montellano, *II Las Obligaciones en el Derecho Divil Boliviano* (2d ed. 1930). Translation by Professor DeVries.

[15] Art. 32. Nadie sera obligado a hacer lo que la Constitucion y las leyes no manden, ni a privarse de lo que ellas no prohiban. English translation by Professor DeVries.

[16] Cuando la obligación preexistente es nacida de un contrato, la culpa es contractual; si esa obligación preexistente ha sido establecida por la ley, la culpa es delictual o cuasidelictual.

La culpa, además, puede consistir en una acción o en una omisión. Romero, *op. cit.*, pp. 405-406. English translation by Professor DeVries (Tr. of September 12, at 216-218).

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We thus begin with the proposition that there must be one of these types of legally cognizable "fault" on the part of the defendant before an injury will be compensable under Articles 966 and 967. What sort of "fault" is alleged here? Dr. Rojas contends that plaintiff suffered an injury cognizable under Articles 966 and 967 because defendants caused Gaensel to sell to them "the mining concessions which were already committed to be formalized as a transfer in favor of" plaintiff. First Rojas Affidavit at 4. Dr. Rojas asserted that the contract between plaintiff and Gaensel, although not judicially enforceable, was valid as a private contract under which plaintiff could force Gaensel to complete the formalities to raise it to an *escritura pública,* and which Gaensel had no right to terminate without judicial approval despite plaintiff's failure to comply with an express condition precedent. Tr. of September 12 at 197-202, 204-206. This would appear to be an argument of "contractual fault." However, any such fault, according to Dr. Rojas' logic and his exposition of Bolivian law, must be laid at the feet of Gaensel. According to plaintiff's contentions, it was he who took the improper or illegal steps of failing to formalize and repudiating the contract. It is not explained how the purported rights and obligations of the parties to the Gaensel-El Cid contract give the latter a cause of action in contractual fault against the *defendants,* who had no pre-existing obligation created by the contract.

Nor, it would appear, did defendants have any pre-existing obligation to plaintiff under Bolivian law. Dr. Rojas does not contend that any Bolivian statute prohibits defendants' winning of the Gaensel contract in the circumstances as alleged by plaintiff, nor has he relied in his affidavits on any statute prohibiting the actions which plaintiff alleges defendants took in furtherance of this

end.[17] In short, Dr. Rojas has not provided any coherent explanation of specifically why or how a Bolivian court would find defendants to be at fault so as to invoke Articles 966 and 967. As we understand his position, he contends that plaintiff was injured by defendants' actions, and that among those injury-dealing actions were the deprivations of rights which had either vested in plaintiff or would there vest after Gaensel performed certain suspensive conditions. Even if we assume the truth of these statements, however, we do not see that they are sufficient to establish liability under Articles 966 and 967. Dr. Rojas appears to interpret the "at fault" requirement to mean simply that a party is liable where it is responsible for causing economic loss to another, whether or not there is any duty on it to refrain from causing such loss. Giving deference to the fact that Dr. Rojas is a practitioner of law in Bolivia, while Professor DeVries is not, we cannot see any basis for this interpretation, either in the writings of the treatises or from our own common sense. Articles 966 and 967 are perfectly comprehensible as compensatory statutes, which of course would come into play when—and only when—a party had been found to have breached some particular duty placed upon him. This interpretation is fully consistent with the treatises quoted above, and we adopt it. Under this reasoning, plaintiff has failed to demonstrate that defendants' alleged actions would be cognizable under Articles 966 and 967.

We thus turn to Article 303. We note, first, that the language of this section does not specify what actions might

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[17] Dr. Rojas did discuss, during his testimony before us on September 12, 1983, several articles of Bolivian law which he asserted prohibited various of the defendants' alleged actions. Under the law of this case, however, as described in n. 4, *supra*, these statutes are not properly before us.

be considered "attacks on the freedom to work." However, the context of the Title and Chapter of the Penal Code in which it is found is illuminating. So far as we have been informed, Title X, Chapter 4 of the Penal Code of Bolivia begins with Article 303 and continues with the following four Articles:

> Art. 304.—(*Monopoly of labor*)
>
> Whoever exercises any kind of monopoly of a licit activity of labor, commerce or industry, will be sanctioned by prison of one to three years and fine of thirty to sixty days.
>
> Art. 305.—(*Wrongful conduct*)
>
> The public official who wrongfully permits the commission of the delicts provided for in the previous two articles will be sanctioned by prison of three months to two years.
>
> Art. 306.—(*Violence or threats by workers and employees*)
>
> The worker or employee who uses violence or threats to compel another or others to participate in a strike or boycott, incurs prison of three months to two years.
>
> Art. 307.—(*Coercion by employer, independent contractor or employee*)
>
> The employer, independent contractor or employee who, by himself or through a third party, coerces another or others to take part in a lock-out, become a member of a determined labor or employer organization, or to leave it, will incur in the sanction of the previous article.

> Prison of three months to three years will be imposed when arms have been used.[18]

Each of the quoted Articles addresses a situation in which some sort of superior power or violence is exercised by one person or entity over another. Although the situation as we described it at the beginning of this Opinion appears to us closer to a business competition situation in which one party happened to possess more experience and know-how in getting things done, plaintiff has alleged that defendants' success with Gaensel, and its failure, was in fact due not to defendants' savvy but to their threats. Specifically, plaintiff has alleged--and defendants have vehemently denied—that Gaensel abandoned his contract with plaintiff and signed with defendants because defendants assured him that they would "tie him up in endless litigation" should he choose otherwise. We have been informed by

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[18] Art. 304.—(*Monopolio de trabajo*)

El que ejercitare cualquier tipo de monopolio de una actividad lícita de trabajo, comercio o industria, será sancionado con reclusión de uno a tres años y multa de treinta a sesenta dias.

Art. 305.—(*Conducta culposa*)

El funcionario público que culposamente permitiere la comisión de los delitos previstos en los dos artículos anteriores, será sancionado con reclusión de tres meses a dos años.

Art. 306.—(*Violencias o amenazas, por obreros y empleados*)

El obrero o empleado que ejerciere violencias o se valiere de amenazas para compeler o otro u otros a tomar parte en una huelga o boicot, incurrirá en reclusión de tres meses a dos años.

Art. 3076.—(*Coacciones por patron, empresario o empleado*)

Incurrirá en la sanción del artículo anterior el patrón, empresario o empleado que por si o por un tercero coaccionare a otro u otros para tomar parte en un lockout, ingresar a una determinada sociedad obrera o patronal, o abandonarla.

Se impondrá reclusion de tres meses a tres años, cuando se hubiere hecho uso de armas.

Dr. Rojas that the use of threats to prevent an individual person or company from working does fall under the ambit of Section 303, Tr. of September 12 at 175; and we have, further, been assured that a Bolivian court would view a promise of endless litigation as a threat cognizable under this section. Tr. of September 12 at 163, 175.[19]

Defendants' counsel cross-examined Dr. Rojas at some length as to precisely what might constitute a threat cognizable under Section 303, the end result of which was a determination that there appears to be no explicit definition of that term in the Bolivian legal corpus. Tr. of September 12 at 209. Further cross-examination yielded the admission that threats of a single lawsuit might not be sufficient to bring a defendant's conduct under Section 303, or any other section of Title X, Chapter 4, Tr. of September 12 at 207, 211-212; and that there might be similarly be no cause of action where two competitors each threatened to sue a third party should he contract with the other, with the result that neither got the desired contract and each sued the other for this failure. Tr. of September 12 at 220-222. All of this, however, convinces us only that there is no

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[19] Neither party has contended that the status of defendants' alleged statements as "threats," or their cognizability under Article 303, is in any way affected by the legal status of the private contract between plaintiff and Gaensel. We concur with this tacit agreement: plaintiff's claim is simply that, by making certain statements to a third party, defendants prevented plaintiff from pursuing its line of work, without regard to the status of any contractual arrangements for that work. Indeed, from the hypotheticals discussed by Dr. Rojas during his testimony, we assume that plaintiff might have made the identical claim had its dealings with Gaensel been interrupted even at the stage of preliminary discussions. Tr. of September 12 at 163-166. We therefore need not consider defendants' contention that the contract between El Cid and Gaensel, not having been raised to an *escritura pública,* was a nullity under Bolivian law and therefore gave plaintiff no rights which defendants could have violated.

bright line as to what is and what is not a threat which obstructs the freedom of work.

As to whether the alleged conduct of defendants in this case does meet the mark, Dr. Rojas answered unequivocally in the affirmative, while defendants have contented themselves with Professor DeVries' statement that

> [a] mining concession is a state-granted monopoly under Bolivian law, and the fact that one party rather than another owns a particular concession could not conceivably be deemed to be a restraint of commerce or industry in violation of Article 303, or violative of any other provision of Chapter 4.

Affidavit in Response to Plaintiff's Submission with Respect to Bolivian Law at 9. This, however, misses the point. Plaintiff asserts that *its own* ability to work or engage in commerce was restrained by defendants, not merely that they restrained the mining industry as a whole. As such, the monopolistic aspects of mining in Bolivia would seem to be irrelevant. Professor DeVries does not explicitly quarrel with Dr. Rojas' conclusion that Article 303 can indeed encompass such private injury; and, since we consider his above-quoted statement to be a misunderstanding of plaintiff's assertion rather than a categorical denial that such a private right exists, we accept Dr. Rojas' interpretation as uncontroverted.

Dr. Rojas has asserted that it would be a question for a Bolivian court whether certain words constitute a threat, Tr. of September 12 at 167. We thus find ourselves in the position of a Bolivian judge confronted with the question of whether or not the particular statements allegedly made by defendants were sufficient to permit plaintiff to invoke the protection of Article 303. We are satisfied that no such judge would wish to decide that question on the meagre

record before us, but would wish to hear evidence from which he could determine exactly what, if any, threats had actually been made. We therefore direct that such a hearing be had. Since plaintiff has not alleged any other conduct which might state a cause of action under Article 303, the hearing will be strictly limited to this question, the resolution of which should allow us to determine both whether plaintiff has stated a cause of action and, if so, whether it will prevail upon it.

Defendants' motion for summary judgment is denied. The Court will contact the parties to establish a date for a hearing on the question of what threats, if any, were made by defendants to plaintiff relative to this action.[20]

So Ordered.

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[20] W reserve until after this hearing our decision as to whether we shall reconsider our provisional grant of summary judgment on plaintiff's first, or antitrust, cause of action.

Decision of Hon. Whitman T. Knapp, Reported at 588 F.Supp. 125

UNITED STATES DISTRICT COURT

S.D. NEW YORK

No. 76 Civ. 1388 (WK).

EL CID, LTD.,

Plaintiff,

v.

The NEW JERSEY ZINC COMPANY, Gulf & Western Industries, Inc., Gulf & Western International Holding Company, Gulf & Western (Canada) Limited, Watts, Griffis & McOuat, Limited, Camino Gold Mines Limited, Condor Mining, Inc., Richard W. Hogeland and David M. Koogler,

Defendants.

July 30, 1984.

Plaintiff brought action alleging that defendants interfered with its contractual, precontractual and business relationships. On defendants' motion for summary judgment, the District Court directed that evidentiary hearing be had. Defendants subsequently filed memorandum arguing that evidence cited by plaintiff was insufficient to create jury question. The District Court, Whitman Knapp, J., held that statements allegedly made by defendants to third party which subsequently abandoned its intention to enter into joint venture with plaintiff were insufficient to permit plaintiff to invoke protection of applicable Bolivian penal statute governing attacks against freedom to work.

Motion granted.

* * *

Decision of Hon. Whitman T. Knapp,
Reported at 588 F.Supp. 125

Malcolm H. Bell, Norwalk, Conn., for plaintiff.

Kassel, Hoffman, Neuwirth & Geiger, by Joseph Einstein; Kimmelman, Sexter & Sobel by Arthur Sobel; Satterlee & Stephens by Henry J. Formon, Jr., New York City, for defendants.

MEMORANDUM & ORDER

WHITMAN KNAPP, District Judge.

At the conclusion of our Opinion of December 15, 1983, 575 F.Supp. 1513, 1524, we observed:

> Dr. Rojas has asserted that it would be a question for a Bolivian court whether certain words constitute a threat. Tr. of September 12 at 167. We thus find ourselves in the position of a Bolivian judge confronted with the question of whether or not the particular statements allegedly made by defendants were sufficient to permit plaintiff to invoke the protection of Article 303. We are satisfied that no such judge would wish to decide that question on the meagre record before us, but would wish to hear evidence from which he could determine exactly what, if any, threats had actually been made. We therefore direct that such a hearing be had.

The purpose of such a hearing would, of course, be to determine whether plaintiff—on the basis of already completed discovery—could present facts sufficient to raise a jury question whether or not defendants had taken action which a Bolivian court would recognize as constituting a threat under Article 303 and, if so, whether or not there was causal connection between such threat and plaintiff's inability to acquire the gold-mining concession it was seeking.

Since then, several things have occurred: Defendants made a motion for reargument contending that we had misapprehended Dr. Rojas' testimony, and that the conduct ascribed to them could not as a matter of law have risen to a violation of Article 303; plaintiff filed a memorandum which, among other things, set forth the evidence it contended created a jury question as to whether or not threats made by defendants against S.J. Groves and Sons ("Groves") caused Groves to abandon its intention to enter into a joint venture with plaintiff,[1] and responded to defendants' motion for reargument; and defendants filed a memorandum arguing that the evidence cited by plaintiff was insufficient to create a jury question ever under our—erroneous according to them—view of Bolivian law.

We conclude that defendants' last mentioned contention is correct. It therefore becomes unnecessary for us to consider their motion for reargument.

After careful consideration of the facts set forth in plaintiff's memorandum—looking at them against the background of all other facts mentioned in the memorandum and taking no account of defendants' memorandum—we cannot conclude that the words and actions attributed to defendants are cumulatively sufficient to present a jury question under our understanding of Dr. Rojas' interpreta-

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[1] Plaintiff's memorandum contains 13 pages of history, a six-page section entitled "Threats Against Gaensel," a ten-page section entitled "Threats Against Groves," and a nine-page section entitled "Threats Against El Cid." We directed defendants to answer only the Groves section of plaintiff's memorandum. Any threats to El Cid (plaintiff) would be irrelevant because there never has been a claim that plaintiff was deterred by, or otherwise failed to achieve its objective because of, any of defendants' alleged threats. Similarly, any threats against Gaensel—the previous owner of the gold-mining concessions—would be irrelevant, since he concededly entered into a contract with plaintiff from which he was released solely because of plaintiff's inability to obtain financing from Groves.

tion of Article 303. Stripped of the innuendo supplied by plaintiff, it only appears that defendants were very anxious to get the goldmining concession for themselves (which, of course, meant that they wanted to prevent plaintiff from getting it); that they were prepared to engage in extensive litigation to achieve this purpose; that they did in fact institute a law suit, which Groves' attorney found "sufficiently [colorable] to tie up the property for a while" (Plaintiff's Memorandum, p. 23); and that defendants kept Groves advised of their intentions in this regard. As we observed in our December 15th Opinion, there is "no bright line as to what is and what is not a threat" under Article 303, 575 F.Supp. at 1523. However, we are satisfied that, wherever that line may be, plaintiff has not presented a jury question as to whether or not it has been crossed.

Defendants' memorandum also contends that any "threats" which might be established cannot have caused plaintiff's inability to consummate its proposed financing deal with Groves and its consequent inability to acquire the gold-mining concession, because Groves' decision not to invest was based on its own evaluation of investment possibilities, wholly unaffected by defendants' conduct (threatening or otherwise). In view of our foregoing conclusion, we need not pass on this contention.

In summary: Defendants' motion for summary judgment is granted; their motion for reargument is denied as moot.

Let the Clerk enter judgment dismissing the complaint.

So Ordered.

Supreme Court, U.S.
FILED
NOV 27 1985
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 85-698

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

EL CID, LTD.,

Petitioner,

vs.

THE NEW JERSEY ZINC COMPANY, GULF & WESTERN INDUSTRIES, INC., GULF & WESTERN INTERNATIONAL HOLDING COMPANY, GULF & WESTERN (CANADA) LIMITED, WATTS, GRIFFIS & MC OUAT LIMITED, CAMINO GOLD MINES LIMITED, CONDOR MINING, INC., RICHARD W. HOGELAND, and DAVID M. KOOGLER,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Introductory Statement

The Gulf & Western ("G&W") defendants' Brief in Opposition demonstrates how readily in this case their forensic skill led to the publication of bad law.* It sharpens the issues of fact, making the summary judgment below more dubious on its face. It sharpens the issues of law, thus highlighting the appropriateness of review by this Court.

On the facts, G&W argue that everything happened abroad, no wrong occurred, and they weren't part of it if it did. Replying to that bland illusion, suffice it here to repeat that both lower courts assumed the illegality of all defendants' conduct but dismissed the Sherman Act claim on "commerce" and "competition" grounds. A-2; B-3. We reply on the legal issues discussed by G&W:

Point 1. *The District Court Confused the "Effect on Commerce" Requirement of the Sherman Act.*

As G&W argue, the District Court held that *defendants'* conduct did not have the required impact on U.S.-foreign commerce because *plaintiff* had not yet imported gold, etc. B-6. The Court of Appeals said, as G&W note (BO-11), that this non sequitur "may well have been correct." A-2. G&W erroneously state that "Petitioner does not even seek review by this Court of this critical issue."** BO-11. In fact, we raised the

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* Herein the Brief in Opposition is cited "BO- ." The Certiorari Petition is cited "CP- ." The decisions below which are reproduced in the CP continue to be cited "A- " and "B- ." "JA- " continues to signify the Joint Appendix below.

** We agree with G&W that this issue was "critical" below. It was on this issue, really, that the Court of Appeals simply terminated nine years of litigation with its demonstrably wrong observation that El Cid could not raise the $25,000 entrance fee that the Sherman Act does *not* require, notwithstanding the record fact that defendants' machinations drove Groves' millions away from El Cid and the Bolgol.

issue in Nos. 5 and 6 of our Questions Presented (PC-i) and argued it in Point 1(c). PC-12-14. Our Question No. 4 and Point 1(a) and (b) also address the issue, since the injury to competition impacted commerce.

The District court correctly held that an antitrust plaintiff must show at least a *de minimis* effect from defendants' conduct complained of upon U.S.-foreign commerce. B-5-6. That is the point of *National Bank of Canada v. Interbank Card Ass'n*, 666 F.2d 6 (2d Cir. 1981), which G&W quote at length at BO-13-14. G&W admit that the linkage between "the behavior objected to" and commerce is the correct focus on this issue. BO-14.

But the District Court suddenly and inexplicably shifted its focus *away* from El Cid's evidence that *defendant's* conduct aimed to and largely did foreclose import into the United States of large amounts of Tipuani gold and the proceeds of gold by Groves, Kilpatrick, and El Cid, as well as by South American Placers, Inc. of New York (JA-232-33), Sunshine Mining Co., Inc. of Idaho (JA-61, 72), and any and all others.* B-6. Instead, the court turned its focus to what is traditionally a "standing to sue" issue, namely, *plaintiff's* intent and preparedness to mine the Tipuani gold and bring it into the United States. Perhaps the court's erroneous shift from the "commerce" issue into the "preparedness" issue explains why astute G&W counsel thought we had failed to address the former. Those less versed in the case are bound to be more confused.

In discussing this "preparedness" issue the G&W brief ignores, as it must, the controlling facts that El Cid was fully prepared

---

* G&W claim that Bolivian law required all Tipuani gold to be sold to the Bolivian government. BO-12. The District Court, however, specifically rejected that claim, stating: "For these purposes, we join plaintiff in rejecting defendants' contention that Bolivian gold can be sold only to the Bolivian government." B-16. G&W did not appeal that ruling.

to go forward in joint venture with the United States-based Groves or Kilpatrick, Groves was similarly prepared until defendants drove it off, and Groves proved the adequacy of these preparations by going forward alone with another Bolivian mine. BO-17-18. Why the lower courts also ignored these facts we cannot explain but this Court can correct.

G&W state, "At best, El Cid asks this Court to review factual findings by the courts below, a practice not engaged in by this Court." BO-17. But this case never reached "factual findings." More to the point is this Court's statement in *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473 (1962):

> We believe that summary procedures should be used sparingly in complex antitrust litigation. ... Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

In this case, with all respect, the lower courts tried the case by affidavit and other papers, drew inferences in favor of defendants instead of plaintiff or actually ignored the evidence that favored plaintiff, and then misapplied the law.

The Federal Supplement antitrust decision in this case holds that the issue of whether defendants' wrongful conduct had the necessary *de minimis* impact on U.S.-foreign commerce depends upon whether plaintiff alone had made sufficient preparations to go into business. This garbled misstatement of the law led to injustice in this case and threatens to do so in others. We respectfully ask the Court to hear and correct it.

Point 2. *The District Court's Holding on Injury to Competition in a Geographic Market Conflicts with Decisions of the Fifth Circuit and Ninth Circuit as well as Its Own District.*

G&W say that in *Brunswick* this Court made it "abundantly clear that injury to competition, as opposed to mere injury to a competitor, is the *sine qua non* of an antitrust violation."

BO-14. That is absolutely correct as far as it goes, but it leaves a gaping gap into which the District Court fell. It begs the question of when injury to *competitors* is injury to competition. Impairment of the competitive freedom of all competitors obviously injures competition, but the District Court used the literal phrasing of *Brunswick* (the antitrust laws protect "*competition* not *competitors*") to blind itself to this truism.

A district court in the Third Circuit misread *Brunswick* similarly in *Zenith Radio Corp. v. Matsushita Electric Industrial Co.*, 513 F.Supp. 1100, 1253n.237 (E.D.Pa. 1981), *modified on other grounds*, 723 F.2d 238 (3rd Cir. 1983), *cert. granted*, 105 S.Ct. 1863 (1985) (argued 11/12/85), as follows:

> Because the antitrust laws are designed to protect competition, not competitors, evidence which shows only injury to individual firms cannot be used to infer injury to the competitive process.

All that that court apparently meant in context was that proof of injury to individual firms is not alone sufficient to show anti-competitive effect, since such injury may have arisen from causes other than defendants' conduct. The misreading of *Brunswick* there had less serious immediate consequences than the one herein.

Part and parcel of the District Court's misinterpretation of *Brunswick* was its confusing misuse of a Clayton Act §7 standard to test the anti-competitive effect of defendants' acts in this case. B-8-10. A §7 standard is appropriate, as it was in the *Northwest Power* case relied on by the court at B-8-9, when defendants' only attack is against plaintiff alone and the only possible injury to competition arises from plaintiff's elimination from the relevant market. In the present case, in contrast, defendants' secret buying of preferential legislation, tying up of property through admittedly "phony" lawsuits, etc. (PC-5-8)

were aimed at destroying all competition for the Tipuani gold fields.* This misapplication of a §7 standard to broadly anti-competitive activity is a dangerous precedent to have on the books.

G&W say at BO-14:

> The Bolgol Concessions are government granted monopolies and competition cannot be affected because one company, rather than another, becomes the owner.

Standard Oil might as well have argued that only one company can own the domestic oil industry. The Tipuani Valley had many concessions. JA-230-39. The issue is whether the competition for the prizes is reasonable or unreasonable, not whether the prizes end up with only one owner.

Echoing the District Court, G&W continue, at BO-15:

> But if the market is the Tipuani Valley, one must wonder why what happened in that market should be of concern to this Court.
>
> The record is devoid of evidence to show how anything that happened in the Tipuani Valley of Bolivia impacted upon an American competitor, or upon trade with the United States, or upon interests protected by our antitrust laws. To defind the market as the Tipuani Valley is senseless. That is the source of supply.

The Fifth Circuit gave short shrift to these G&W/lower court positions in the *Mitsui* case discussed at PC-11-12.** G&W say

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* I respectfully call the Court's attention to a typo in the middle of CP-5. "PROTECT" in the first line of the quoted telex should be "PROYECT."

** G&W also say that our Petition "grossly misdescribes" *Mitsui* on the geographic market issue, but go on to explain that that plaintiff's posture differed from El Cid's on the preparedness issue. BO-16.

(BO-17) that *Mitsui* is "a far cry from the case at bar," but quote language in *Mitsui* that shows the opposite, as follows:

> Here an American corporation with an interest in protection of its import business has allegedly conspired to eliminate a potential American competitor in both the business of purchasing logs in Indonesia and the business or importing lumber and lumber products into the United States. 671 F.2d 876 at 884.

Likewise in the case at bar, an American corporation, G&W, with an interest in protecting its $2,275,000 investment in the Tipuani project, conspired to eliminate Groves (U.S.), Kilpatrick (U.S.), El Cid and all other potential American and foreign competitors in both the business of mining gold in Bolivia and the business of importing gold and the proceeds of gold into the United States.

The Ninth Circuit in *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597 (9th Cir. 1976), cited by G&W at BO-12-13, similarly held it error to dismiss an antitrust claim that alleged that United States defendants harrassed and disrupted United States and Honduras plaintiffs' efforts to acquire lumber in Honduras and import it into the United States. "Market" should have been no more of a problem in the instant case than it proved to be in *Timberlane* or in *Mitsui*.

In *Dominicus Americana Bohio v. Gulf & Western Industries*, 473 F.Supp. 680 (S.D.N.Y. 1979), the G&W defendants there used much the same tactics as they used in the instant case to block plaintiffs, some of whom had not yet begun operations, from developing a tourist area that G&W wanted for itself in the Dominican Republic. The Southern District of New York sustained plaintiffs' market, effect on competition and commerce, and antitrust claims. Why the lower courts herein did not follow *Dominicus* and avoid error, again, we cannot explain but this Court can correct.

This case gives the Court an opportunity to explain the ambiguity in *Brunswick* once and for all, and to make some clear pronouncements that are badly needed about market definition and effect on commerce and competition.

Point 3. *The Choice of Law Issue Merits Review if Any Such Issue Ever Merits Review.*

G&W directed, controlled, and paid for intentionally tortious acts from its Gulf + Western Plaza headquarters a few miles north of both lower courts in New York, New York. But the lower courts held that El Cid cannot seek redress under New York tort law. That is not right.

The G&W choice-of-law argument is essentially that this Court cannot touch the issue. They rely on *Butner v. United States*, 440 U.S. 48, 57-58 (1979), in which "the parties have argued the [real property] state-law questions at great length, each stressing different aspects of the record." BO-20. But the present case is precisely the opposite, as it would seem hard and pointless for the parties to stress at great length different aspects of the short list of factors that Judge Knapp considered in making a choice of law.

In the negligence case of *Richards v. United States*, 369 U.S. 1, 16n.35 (1962), this Court stated that it "ordinarily" accepts a Court of Appeals determination of state (choice-of-law) interpretation, at least where petitioner does not contest that interpretation. In this case, however, where "most significant relationship" is the issue and where the intentionality, direction, and funding of the intentional tort occurred in New York, mere agents acted in Bolivia, and the injury to El Cid's business was suffered in Costa Rica, this is not an ordinary case.

If this Court will ever again review a choice-of-law decision, we submit that it probably has before it an ideal case in which to do so now. The New York law is agreed. The record is simple. The lower courts' misapplication is clear and appears arbitrary. The injustice was great. Is such a case not reviewable

at this level? The answer to that question goes beyond the interests of the parties. It goes to the administration of justice, and should be of interest to all Courts of Appeals.

CONCLUSION

For the foregoing reasons and those previously stated, a writ of certiorari should issue to review the orders herein of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: Norwalk, Connecticut
November 26, 1985